(19)

No. 90-1604-CFX
Status: GRANTED

Title: Dan Morales, Attorney General of Texas, Petitioner
v.
Trans World Airlines, Inc., et al.

Docketed:
April 16, 1991

Court: United States Court of Appeals
for the Fifth Circuit

Counsel for petitioner: Gardner,Stephen

Counsel for respondent: Secrest,Ronald D., Shelden,Albert Norman, Jones,Keith A.

Entry	Date	Note	Proceedings and Orders
1	Apr 16 1991	G	Petition for writ of certiorari filed.
2	May 16 1991		Brief of respondents Trans World Airlines, Inc., et al. in opposition filed. VIDED.
3	May 20 1991		Brief amici curiae of Hawaii, et al. filed. VIDED.
4	May 21 1991		DISTRIBUTED. June 6, 1991
5	Jun 10 1991	P	The Solicitor General is invited to file a brief in this case expressing the views of the United States.
6	Oct 24 1991		Brief amicus curiae of United States filed. VIDED.
7	Oct 30 1991		REDISTRIBUTED. November 15, 1991
8	Oct 30 1991	X	Reply brief of petitioner Dan Morales, Atty. Gen. of TX filed. VIDED.
9	Nov 1 1991	X	Supplemental brief of respondents Trans World Airlines, Inc., et al. filed. VIDED.
11	Nov 21 1991		REDISTRIBUTED. November 27, 1991
12	Nov 27 1991		Petition GRANTED.
			**********
13	Dec 11 1991		Record filed.
		*	Partial proceedings and briefs United States Court of Appeals for the Fifth Circuit.
14	Jan 2 1992		SET FOR ARGUMENT TUESDAY, MARCH 3, 1992. (3RD CASE)
15	Jan 10 1992		Brief of respondents Thirty-One State Attorneys General in support of petition filed.
16	Jan 13 1992		Joint appendix filed.
17	Jan 13 1992		Brief of petitioner Dan Morales, Attorney General of Texas filed.
18	Jan 13 1992		Brief amici curiae of Hawaii, et al. filed.
19	Jan 13 1992		Brief amicus curiae of Public Citizen, et al. filed.
20	Jan 22 1992	G	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
22	Jan 24 1992		CIRCULATED.
21	Jan 27 1992		Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
23	Jan 28 1992	D	Motion of Public Citizen, et al. for leave to participate in oral argument as amici curiae, for divided argument and for additional time for oral argument filed.
25	Feb 1 1992		Record filed.
		*	Original record U.S. District Court, Western District ofTexas, 10 Volumes (1 BOX)

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Entry	Date	Note	Proceedings and Orders
24	Feb 10 1992		Opposition of petitioners to motion of Public Citizen, et al. for leave to participate in oral filed.
26	Feb 10 1992	X	Brief amicus curiae of Association of National Advertisers, Inc. filed.
27	Feb 11 1992	X	Brief amici curiae of American Assn. of Advertising Agencies, Inc., et al. filed.
28	Feb 12 1992	X	Brief amicus curiae of American Airlines, Inc. filed.
29	Feb 13 1992	X	Brief of respondents Trans World Airlines, et al. filed.
30	Feb 13 1992	X	Brief amicus curiae of United States filed.
32	Feb 21 1992	X	Reply brief of petitioner Dan Morales, Atty. Genereal of Texas filed.
31	Feb 24 1992		Motion of Public Citizen, et al. for leave to participate in oral argument as amici curiae, for divided argument and for additional time for oral argument DENIED.
33	Mar 3 1992		ARGUED.

90-1604

Supreme Court, U.S.
FILED
APR 16 1991
OFFICE OF THE CLERK

No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

DAN MORALES,
ATTORNEY GENERAL OF TEXAS,
Petitioner,
v.

TRANS WORLD AIRLINES, INC., *et al.,*
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Of Counsel:
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QUESTION PRESENTED

Can airlines falsely advertise air fares in Texas, in total disregard of state law prohibitions, merely because the federal government has pre-emptive regulatory authority over an airline's "rates, routes, or services" under the Federal Aviation Act?

LIST OF PARTIES

This petition is filed by Texas Attorney General Dan Morales.[1] In addition to Texas, 33 state attorneys general were defendants in the proceedings below.[2] Texas anticipates that some or all of these states will petition the Court separately for a writ of certiorari on questions in which Texas does not have a formal interest.

The plaintiffs/appellees below were Trans World Airlines, Inc.; Continental Airlines, Inc.; British Airways PLC; Air Canada; Compagnie Nationale Air France; Alitalia-Linee Aeree Italiane, S.p.A.; El Al Israel Airlines Ltd.; Finnair; Lufthansa German Airlines; Japan Air Lines Company, Ltd.; Qantas Airways Ltd.; Scandinavian Airlines System; Viacao Aerea Rio-Grandense (VARIG); and Pan American World Airways, Inc. All 14 of these parties below are respondents to this petition.[3]

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1 Petitioner will be referred to herein as "Texas."

2 These are the Attorneys General of the States of Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Florida, Idaho, Illinois, Iowa, Kansas, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, Nevada, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Rhode Island, South Dakota, Tennessee, Vermont, Washington, West Virginia, Wisconsin and Wyoming.

3 These 14 respondents will be jointly referred to as "airlines" or "respondents."

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No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

DAN MORALES,
ATTORNEY GENERAL OF TEXAS,
Petitioner,
v.

TRANS WORLD AIRLINES, INC., *et al.*,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner Dan Morales, Attorney General of Texas,[4] respectfully prays that the Court grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fifth

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[4] At the time the lawsuit was filed, the Texas Attorney General was Jim Mattox. On January 1, 1991, Attorney General Mattox left office and current Attorney General Dan Morales assumed office. Since the injunction was directed at the Attorney General in his official capacity, the current Attorney General of Texas has been substituted as petitioner pursuant to Rule 35.3 of the Rules of this Court and Rule 43(c)(1) of the Federal Rules of Appellate Procedure.

Circuit, entered in the above-entitled proceeding on January 18, 1991.

OPINIONS BELOW

The January 18, 1991, opinion of the United States Court of Appeals for the Fifth Circuit is reprinted at Appendix, *infra*, p. 1a. The Fifth Circuit determined that the opinion should not be published, and it is therefore unreported.

This case has been the subject of a prior appeal, from the district court's issuance of a preliminary injunction. The court of appeals affirmed the issuance of that preliminary injunction on April 3, 1990. *Trans World Airlines, Inc. v. Mattox*, 897 F.2d 773 (5th Cir. 1990); Appendix, *infra*, p. 13a. After the court of appeals issued its prior opinion, the district court entered a permanent injunction and final judgment on June 4, 1990. This permanent injunction is reprinted at Appendix, *infra*, p. 8a. It is virtually identical to the preliminary injunction that the court of appeals affirmed in its prior order. On October 15, 1990, this Court denied Texas's petition for writ of certiorari, Justice Blackmun noting that he would dismiss the petition as moot. 111 S.Ct. 308 (1990). On January 18, 1991, the court of appeals affirmed the permanent injunction, based on its prior order with respect to the merits of the preliminary injunction.

JURISDICTION

The airlines invoked district court jurisdiction of this matter under 28 U.S.C. § 1331 and 1337.

The court of appeals, on January 18, 1991, entered a judgment and an opinion affirming the district court's permanent injunction. *See* Appendix, *infra*, p. 1a. No petition for rehearing was sought.

The jurisdiction of the Court to review the judgment of the court of appeals is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Federal Aviation Act § 105(a)(1), 49 U.S.C. § 1305(a)(1) [in pertinent part]. Federal precmption.

[N]o State or political subdivision thereof and no interstate agency or other political agency of two or more States shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier having authority under subchapter IV of this chapter to provide air transportation.

Federal Aviation Act § 411(a), 49 U.S.C. § 1381(a). Methods of competition.

The Board may, upon its own initiative or upon complaint by any air carrier, foreign air carrier, or ticket agent, if it considers that such action by it would be in the interest of the public, investigate and determine whether any air carrier, foreign air carrier, or ticket agent has been or is engaged in unfair or de-

ceptive practices or unfair methods of competition in air transportation or the sale thereof. If the Board shall find, after notice and hearing, that such air carrier, foreign air carrier, or ticket agent is engaged in such unfair or deceptive practices or unfair methods of competition, it shall order such air carrier, foreign air carrier, or ticket agent to cease and desist from such practices or methods of competition.

Federal Aviation Act § 1106, 49 U.S.C. § 1506. Remedies not exclusive.

Nothing contained in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies.

Texas False Advertising Law, TEX. BUS. & COM. CODE §§ 17.46(a), 17.46(b)(9), and 17.46(b)(11). [in pertinent part].

False, misleading, or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful . . .. [T]he term "false, misleading, or deceptive acts or practices" includes, but is not limited to . . . advertising goods or services with intent not to sell them as advertised,. . . [or] making false or misleading statements of fact concerning the reasons for, existence of, or amount of price reductions . . ..

STATEMENT OF THE CASE

On January 23, 1989, Trans World Airlines, Inc.; Continental Airlines, Inc.; and British Airways PLC commenced this action in the United States District Court for the Western District of Texas, Austin Division, in which the Texas Attorney General was the only named defendant. This action sought both preliminary and permanent relief prohibiting the Texas Attorney General and unspecified others from enforcing the Texas Deceptive Trade Practices Act, or any other (also unspecified) state law, against airline advertising, an injunction that would effectively insulate these airlines from prosecution by the State of Texas for false or deceptive advertising.

These airlines took this extraordinary step of invoking federal court jurisdiction as a shield to avoid conjectured prosecution for violating state laws because the Texas Attorney General and the attorneys general of five other states had written to these airlines in late 1988, advising these airlines that their advertising practices were deceptive and requesting that they voluntarily modify their practices. Rather than comply with state law, the airlines brought suit.

The district court heard these airlines' request for a temporary restraining order on January 27. Not to be outdone by the airlines in unprecedented actions, the district court granted the airlines a preliminary injunction on the next business day. This order enjoined the Texas Attorney General and all other persons acting in concert or participation with him, *and* "all other persons having actual knowledge of" the injunction, from:

> [I]nitiating any enforcement action pursuant to Tex. Bus. & Comm. Code §§17.41 et seq. or any

other provision of state law, which would seek *to regulate or restrict any aspect of the individually named plaintiff airlines' air fare advertising* or the [*sic*] operations involving their rates, routes and/or services.

Appendix, *infra*, p. 50a [emphasis added].

On April 26, 1989, the district court continued on its course of blazing new paths of judicial activism, permitting 10 additional airlines to intervene and broadening the preliminary injunction to include 33 more attorneys general within its scope. Appendix, *infra*, p. 52a.

On appeal, the court of appeals affirmed every action of the district court, holding that the district court's sweeping preliminary injunction was proper because "§1305(a)(1) expressly preempts state deceptive advertising laws as applied to airline fare advertising." Appendix, *infra*, p. 34a; 897 F.2d at 783.

The preliminary injunction was converted by the district court into a permanent injunction, on June 1, 1990. Appendix, *infra*, p. 8a. The relevant provisions of the permanent injunction, and the basis therefor (federal pre-emption of state consumer protection laws), are the same as those in the preliminary injunction.

This Court denied Texas's petition for writ of certiorari with respect to the Fifth Circuit's opinion on the preliminary injunction, on October 15, 1990, Justice Blackmun noting that he would have dismissed the petition as moot. 111 S.Ct. 308 (1990).

On January 18, 1991, the Fifth Circuit affirmed the issuance of the permanent injunction, based on its determination that its prior opinion on the merits

of the preliminary injunction was the law of the case. Appendix, *infra*, p. 1a.

REASONS FOR GRANTING THE WRIT

This is a case of national significance and far-reaching implications. Acting on no more than the desires of some of the less-scrupulous airlines[5] to avoid the inconvenience of advertising honestly, a federal district court issued, and a court of appeals affirmed, a sweeping injunction that freezes all efforts at enforcement of state consumer protection laws against airlines who intentionally violate those laws in order to steal business away from honest competitors.[6]

In reaching this surprising result, the courts below absolutely ignored the repeated insistence by the Court that pre-emption of state law is to be found only when it is absolutely clear that pre-emption is what Congress–not a few airlines–wanted. And it is only by ignoring the teachings of the Court on pre-emption that the courts below could have reached

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5 And less solvent. Since this case began, two of the three domestic carriers–Continental and Pan Am–have filed for protection of the bankruptcy courts under Chapter 11 of the Bankruptcy Code. The third–Trans World Airlines–has stated that it also is considering taking that route. Nomani, *TWA May Seek Chapter 11 Status, Even in Routes Sale*, Wall Street Journal, Apr. 3, 1991, at B8.

6 It is unlikely that the Court will have the opportunity, aside from this case, to address this issue in the foreseeable future. All other cases known to Texas that involve this question are now pending in state court (or have been dismissed), and are specifically excepted from the provisions of the injunction herein. *See* Appendix, *infra*, pp. 10a. The effect of the injunction is to prohibit the filing of any additional lawsuits by any state, whether in state or federal court.

the result they did, for the result reached flies in the face of years of precedent in the Court.[7]

In essence, the court of appeals decided that, when Congress enacted the Airline Deregulation Act of 1978, amending the Federal Aviation Act, Congress intended to divest the states of their long-standing power to regulate airline advertising. The court of appeals has strayed far off course.[8] In

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7 The excessiveness of the district court's order can also be seen in the scope of relief granted. Rather than limiting itself to enjoining the State of Texas, the court reached out and dragged into Texas a total of 33 additional states, most of whom had never had any contact with the State of Texas or any of the airlines regarding airline practices. The over-reaching nature of this injunction serves to underscore the degree to which the district court and court of appeals departed from the accepted and usual course of judicial restraint in the exercise of the limited jurisdiction of the federal courts.

8 The courts below are not the only courts needing guidance on the manner in which to apply the limited pre-emption language of the Act, as is apparent from a review of the differing rationales and results of other courts of appeal. *See, e.g., Alaska v. U.S. Department of Transportation*, 868 F.2d 441, 444 (D.C. Cir. 1989) (Federal Aviation Act permits Department of Transportation to pre-empt state law through regulation); *French v. Pan Am Express, Inc.*, 869 F.2d 1, 1 (1st Cir. 1989) (Federal Aviation Act pre-empts Rhode Island statute regulating circumstances under which employers can require employees to submit to drug testing); *In re Air Crash Disaster at John F. Kennedy International Airport on June 24, 1975*, 635 F.2d 67, 74 (2d Cir. 1980) (Federal Aviation Act does not pre-empt New York State General Business Law prohibition against operation of aircraft in a careless or reckless manner); *Bieneman v. City of Chicago*, 864 F.2d 463, 471 (7th Cir. 1988) (Federal Aviation Act does not pre-empt Illinois state common law remedies for airport noise and pollution); *Illinois Corporate Travel, Inc. v. American Airlines, Inc.*, 889 F.2d 751, 755 (7th Cir. 1989), *cert. denied*, 110 S.Ct. 1948 (1990) (Federal Aviation Act pre-empts Illinois Consumer Fraud and Deceptive Business Practices Act to the extent that that Act would require an "air carrier to deal with a would-be agent who refuses to respect a contract restricting advertising of discount prices"); *Hingson v. Pacific Southwest Airlines*, 743 F.2d 1408, 1415 (9th Cir. 1984) (Federal Aviation Act pre-empts California state law providing for full and equal access to airplanes by the handicapped; the Act does not pre-empt California-tort-law-based claims for intentional infliction of emotional distress); and *Air Transport Ass'n of America v. Public Utilities Commission of California*, 833 F.2d 200, 207 (9th Cir. 1987), *cert. denied*, 108 S.Ct. 2904 (1988) (Federal Aviation Act does not pre-empt "state regulation of utilities insofar as such regulation affects airlines"). At least one state appellate court has also reached the opposite conclusion from the court of appeals here. *People v. Western Airlines, Inc.*, 155 Cal. App. 3d 597, 600, 202 Cal. Rptr. 237 (Cal. Ct. App. 1984), *appeal denied* (Cal. Sup. 1984), *cert. denied*, 469 U.S. 1132 (1985) (Federal Aviation Act does not pre-empt California false advertising laws).

addition, its interpretation of the Act conflicts with a subsequent interpretation by another court of appeals.

In 1978, the country was in a flurry of deregulation activity. The Airline Deregulation Act of 1978 was just one manifestation of that activity. But Congress no more intended, in deregulating airline rates, to prohibit all state authority with respect to the airlines than it intended, in deregulating the savings and loan industry, to foreclose state criminal prosecutions for fraud by the less-scrupulous members of that industry.

In fact, Congress's purpose in enacting the Airline Deregulation Act of 1978 was to encourage competition among the airlines by taking the federal government out of the business of utility-type economic regulation of airlines (setting rates, routes, and services). Congress made sure that no other governmental entity stepped into the breach to defeat the purposes of that deregulation, by adopting Section

105 of the Federal Aviation Act, 49 U.S.C. § 1305(a)(1). *See* 123 CONG. REC. 30595 (Sept. 23, 1977); Pub L. 95-504, 1978 U.S. CODE CONG. & ADMIN. NEWS 3737, 3740; and 49 U.S.C. § 1302(a)(5).

Prior to 1978, the federal government had strictly dictated the rates, routes, and services an airline could offer. By terminating this control, Congress hoped to encourage competition among airlines and bring ticket prices down. 49 U.S.C. § 1302(a)(3); Pub L. 95-504, 1978 U.S. CODE CONG. & ADMIN. NEWS 3737, 3773. In so doing, Congress intended to subject airline practices to the full rigors of the marketplace. [9]

State regulation of air fare advertising plays an essential role in ensuring efficient functioning of the marketplace. It makes the marketplace function better by making it function honestly. This benefits the consumer, who gets the information needed to make a proper purchasing decision, and it rewards the honest airline, which does not lose sales to the dishonest one.

The state laws that the court of appeals decided were pre-empted are general consumer protection statutes enacted by state legislatures to prevent deceptive and misleading commercial practices. None of them is directed at airline practices in particular. For example, the Texas statute provides:

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9 For this reason, at the same time it deregulated rates, routes, and services, Congress also took away from the airlines the protection they had previously enjoyed from the requirements of antitrust laws prohibiting price-fixing. *See* 49 U.S.C. § 1551(a)(2)(A) (repealing Section 1373, which permitted air carriers to fix prices for tickets, with federal approval, and required travel agents not to discount those fixed prices).

> False, misleading, or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful . . .. [T]he term "false, misleading, or deceptive acts or practices" includes, but is not limited to . . . advertising goods or services with intent not to sell them as advertised . . . [or] making false or misleading statements of fact concerning the reasons for, existence of, or amount of price reductions . . ..

TEX. BUS. & COM. CODE §§ 17.46(a), 17.46(b)(9), and 17.46(b)(11).

This law applies to used car dealers, pyramid schemers, and snake oil sellers. It also applies to other forms of travel with which the airlines directly compete–trains, buses, rental cars–and to others in the travel industry–travel agents, hotels, motels.

The decision of the court of appeals can only be based on the erroneous conclusion that Congress intended that the airlines (alone among all industries) be granted *carte blanche* to violate these general state false advertising laws, without threat of state law enforcement action to prohibit and punish those violations, simply because the Federal Aviation Act gave the United States Department of Transportation ("Department") the job of policing false advertising at the federal level.

The Fifth Circuit was apparently unconcerned about the practical effect of precluding state law enforcement because it believed that the Department could do the job all by itself. *Trans World Airlines, Inc. v. Mattox*, 897 F.2d 773, 783 (5th Cir. 1990); Appendix, *infra*, at 34a.

Unfortunately, the Department is *not* doing its job. A recent newspaper article lamented the actual

unavailability of bargain fares to Europe advertised by airlines such as Continental and Pan Am and noted the Department's inability, due to limited enforcement capabilities, to police bait and switch tactics. Sharkey, *Bargain Fares, But How Many?*, New York Times, Mar. 31, 1991, Travel Section at 3, col. 1.

Beyond bait and switch, it is clear that airlines are now engaging in precisely the activity that Texas and other states would seek to stop. For example, a recent Pan Am advertisement in *The Dallas Morning News* emblazons a $299 fare to Paris and other European destinations in numbers nearly three inches high. Dallas Morning News, Mar. 19, 1991, at 11A. Then, in letters one-sixteenth of an inch high, Pan Am qualifies that price with the statement that the "Fare is each way based on roundtrip economy purchase." The fare thus jumps to $598. But only the most thoroughgoing reader would then wade through the morass of mice type at the bottom of the advertisement that says (among other things) that a "$26 U.S. departure tax, security surcharge, customs/immigration fee [is] not included," increasing the fare still further to $624. What began, writ large, as a bargain $299 fare has now grown by 209%, and is decidedly less the bargain Pan Am wants its unwitting passengers to believe.

During the same period of time, Continental advertised bargain fares in the *Dallas Times Herald*. Dallas Times Herald, Mar. 20, 1990, at A11. A ticket to Paris was advertised at $159, with the notation that the price was "each way (roundtrip purchase required)," elevating the fare to $318. Here, however, to learn what (if any) additional charges might be

added on, the consumer must decipher this statement in the mice type at the bottom of the page:

> $6 International Departure Tax, $5 Customs Fee (not applicable Mexico and Caribbean), $5 Immigration and Naturalization Fee (not applicable U.S. Virgin Islands), and Security Fee (not applicable U.S. Virgin Islands), which may be different depending upon destination ($10 Europe, Caribbean and Latin America, $15 Jamaica, $21 Dominican Republic), not included in fare.

An educated guess is that the consumer will be faced with an additional $26 in fees, just as with Pan Am, resulting in an actual fare of $344–*216% over the fare promoted* by Continental.

The Department needs all the help it can get in policing advertising of this nature. The federal courts should not be used as a vehicle to frustrate a state's efforts to enforce its own laws to protect its citizens, especially when the federal agency cannot do the job by itself.

In concluding that Congress intended the Federal Aviation Act to have such sweeping pre-emptive effect over state false advertising laws, the court of appeals ignored the repeated statements of the Court that pre-emption may be found to exist only when it is clear that pre-emption is what Congress intended.

> The principle to be derived from our decisions is that federal regulation of a field of commerce should not be deemed preemptive of state regulatory power in the absence of persuasive reasons–either that the nature of the regulated subject matter permits no other conclusion, or *that the Congress has unmistakably so ordained*.

Florida Lime and Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142 (1963) [emphasis added].

The Court has repeatedly affirmed the "presumption against finding preemption of state law in areas traditionally regulated by the States" and the "assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *California v. Federal Energy Regulatory Comm'n*, 110 S.Ct. 2024, 2029 (1990), *quoting Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). There is a long history of state enforcement of consumer protection laws as an aspect of state police powers. *See, e.g., Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963) and *Friedman v. Rogers*, 440 U.S. 1 (1979).

It is with this presumption against finding preemption that we must approach any analysis of the effect of the Federal Aviation Act on state false advertising laws.

Another court of appeals has approached an analysis of the Act in a manner in keeping with the teachings of this Court. In *West v. Northwest Airlines, Inc.*, 923 F.2d 657 (9th Cir. 1991), the Ninth Circuit held that Section 105 of the Federal Aviation Act pre-empts claims based on state law "only when the underlying statute or regulation itself relates to airline services, regardless of whether the claim arises from a factual setting involving airline services. Thus, state laws that merely have an *effect* on airline services are not preempted." 923 F.2d at 660 [emphasis in original].

This holding of the Ninth Circuit is in clear conflict with the interpretation of Section 105 upon

which the Fifth Circuit based its holding in this case. The Ninth Circuit does not discuss the Fifth Circuit's opinion. It does, however, cite as authority *New York ex rel. Abrams v. Trans World Airlines, Inc.*, 728 F.Supp. 162 (S.D.N.Y. 1990). The district court there was aware of the district court's holding in this case and did not follow it. *Id.*, 728 F.Supp. at 166-167.

It could be asked whether *West* must be disregarded because the holding of the Ninth Circuit did not directly involve airline advertising. But this is neither a distinction nor a difference. It ignores the fact that the injunction at issue in this case itself involves much more than airline advertising. The permanent injunction issued by the district court restrains the states from initiating any enforcement actions pursuant to state law "which would *seek to regulate or restrict any aspect of the individually named Plaintiff airlines'* air fare advertising or their other *operations involving their* rates, routes, and/or *services*." Appendix, at 10a [emphasis added]. In addition, one case cited with approval by the *West* court, 923 F.2d at 660, did in fact involve state regulation of airline advertising. *New York ex rel. Abrams, supra.*

The issues in the case before the Court fall squarely within the reasoning and holding of *West*. The *West* opinion is in clear conflict with the Fifth Circuit's opinion.[10]

The approach taken by the court of appeals is a radical departure from the conservative approach

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10 The *West* court also discussed and rejected implicit and conflict pre-emption. 923 F.2d at 660-661. Although the Fifth Circuit limited its pre-emption finding to explicit pre-emption, *West* stands for the proposition that the state laws at issue here are not pre-empted in any way.

long mandated by the Court, and followed by the Ninth Circuit in *West*. The Fifth Circuit's approach should be corrected.

This Court last addressed the specific issue of pre-emption of state law by the Federal Aviation Act in *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290 (1976), and found no basis for pre-emption.

The Court there construed Section 411 of the Federal Aviation Act, 49 U.S.C. § 1381(a). That section gives the Department of Transportation the authority to stop "unfair or deceptive practices or unfair methods of competition in air transportation or the sale thereof."

When Congress, in 1978, stopped federal regulation of airlines' rates, routes, and services and enacted Section 105 to keep the states from beginning that very regulation, Congress left Section 411 untouched. If Congress had intended to deregulate the airlines so radically as to permit them to engage in deceptive practices without fear of prosecution, it would have repealed Section 411 when it enacted Section 105. But it did not–a clear indication that Congress intended regulation of deceptive practices by airlines to continue just as it had existed before it enacted Section 105.

In *Nader*, the Court held that Congress did not intend exclusive federal regulation of deceptive airline practices. *Nader v. Allegheny Airlines, Inc.*, 426 U.S. at 301. The Court concluded that Congress, in providing for federal regulation of unfair or deceptive practices, did not intend to immunize airlines from liability under state law.

> In sum, § 411 confers upon the [Civil Aeronautics] Board [now, the Department of Transportation] a new and powerful weapon against unfair and deceptive practices that injure the public. But it does not represent the only, or the best, response to all challenged carrier actions that result in private wrongs.

Nader v. Allegheny Airlines, Inc., 426 U.S. at 303.

In reaching this conclusion, the Court relied in particular on the savings clause in the Act:

> Nothing contained in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies.

Section 1106, 49 U.S.C. § 1506; *Nader v. Allegheny Airlines, Inc.*, 426 U.S. at 300.

When Congress enacted the Airline Deregulation Act in 1978, *Nader* was a recent case, one of which Congress was surely aware. Had Congress wanted to overrule *Nader*, and to prevent state regulation of false advertising, it could have done so at that time.

Congress could easily have included advertising within the scope of the pre-emption–"relating to rates, routes, services, or advertising."[11] It could have made the language very broad–"relating to operations." But Congress did not do so. The fact that it did not is further indication that it intended to permit continued state authority. Instead, Congress enacted

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11 *See, e.g.*, 15 U.S.C. § 1334(b): "No requirement or prohibition based on smoking and health shall be imposed under State law *with respect to the advertising or promotion* of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter [on cigarette labeling and advertising]." [Emphasis added.]

limited pre-emption language, and that language must be given a limited reading. That limited reading does not result in pre-emption of state advertising regulation, because advertising is not a rate, route, or service.

In arriving at its conclusion, the Fifth Circuit relied on the Court's line of cases construing the Employee Retirement Income Security Act of 1974 ("ERISA"), simply because both ERISA and the Federal Aviation Act pre-empt state laws "relating to" certain aspects of those Acts. *Trans World Airlines, Inc. v. Mattox*, 897 F.2d 773, 780 (5th Cir. 1990); Appendix, *infra*, p. 25a.

The Fifth Circuit's reliance on the Court's ERISA cases is misplaced. ERISA pre-emption is founded on three separate provisions of ERISA–the pre-emption clause, the savings clause, and the deemer clause–which the Court reads together to find sweeping pre-emption under ERISA. *FMC Corp. v. Holliday*, 111 S.Ct. 403, 407 (1990). Unless a statute that would be covered by the savings clause is excluded by the deemer clause, there is no pre-emption. *Id.*, at 409.

However, unlike ERISA, the Federal Aviation Act has only a pre-emption clause and a savings clause–there is no deemer clause to restrict the effect of the savings clause. And this Court has already affirmed that the savings clause provides that the Act does not abridge or alter remedies at common law or by statute. *Nader v. Allegheny Airlines, Inc.*, 426 U.S. at 300; Section 1106, 49 U.S.C. § 1506.

The need for continued vitality of the savings clause is underscored by the fact that the Federal Aviation Act, unlike ERISA, does not provide a federal remedy when pre-empting state law enforcement. *See Ingersoll-Rand Co. v. McClendon*, 111 S.Ct. 478, 485 (1990). If the Act's pre-emptive effect is as broad as the Fifth Circuit would have it, then the State and its citizens are left without any remedy for deceptive airline practices.

The direct result of the court of appeals decision is to stymie all efforts by the states to control the deceptive practices of the airlines. The breadth of the injunction gives the states no alternative but to stop policing those practices. To do otherwise is to risk contempt of court.

The indirect result of the court of appeals decision is to give the airlines a basis for avoiding state policing of illegal activities having no connection with advertising, but which arguably are within the penumbra of "any aspect of the individually named plaintiff airlines' . . . operations involving their rates, routes, and/or services." Appendix, *infra*, p. 10a. Quite conceivably, if this decision stands, we will see an attempt to avoid the application of state antitrust laws, since enforcement of those laws might somehow "involve" rates, routes, or services. The potential for a hodgepodge of decisions is great, despite the Court's repeated deference to state antitrust laws. *See California v. American Stores Co.*, 110 S.Ct. 1853 (1990) and *California v. ARC American Corp.*, 109 S.Ct. 1661 (1989).

Criminal laws, too, are open to attack. For example, states must be free to prohibit, or to permit, gambling–something some people might consider a "service"–in airline terminals (such as slot machines in Nevada airports). It is unlikely that Congress intended to displace all state criminal law. *See English v. General Electric Co.*, 110 S.Ct. 2270, 2277 (1990). But, if the logic of the court of appeals is allowed to stand,

control of gambling in airline terminals "relates to" services, and will be claimed to be pre-empted.

Pre-emption of state antitrust laws and criminal laws is clearly not what Congress intended when it amended the Federal Aviation Act in 1978. By the same token, neither did Congress intend to pre-empt state false advertising laws. That is what the court of appeals did in its decision, and the intervention of the Court to settle the matter is needed.

CONCLUSION

For the reasons stated, this petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 90-8387
Summary Calendar

TRANS WORLD AIRLINES, INC., et. al,

Plaintiffs-Appellees,

versus

JIM MATTOX, Attorney General of
the State of Texas, et. al.,

Defendants-Appellants.

Appeal from the United States District Court for the
Western District of Texas
(CA A 89 CA 67)

(January 18, 1991)

Before JOHNSON, SMITH and WIENER, Circuit Judges.

PER CURIAM:[1]

Defendants[2] appeal from the district court's grant of Plaintiffs' motion for summary judgment and the imposition of a permanent injunction. Finding no error, this Court affirms.

I. FACTS AND PROCEDURAL HISTORY

The background facts for this appeal are thoroughly explained in the prior consolidated appeal of this action. See **Trans World Airlines, Inc. v. Mattox,** 897 F.2d 773 (5th Cir.1990). In the prior appeal, a panel of this Court affirmed the district court's issuance of a preliminary injunction. It is necessary here only to note one significant factual event which occurred subsequent to the prior appeal. The district court, after considering this Court's prior opinion, granted summary judgment in favor of Plaintiffs and permanently enjoined the Defendants and "all other parties acting in concert or participating with the Defendants [sic] or on their

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1 Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal professions." Pursuant to that Rule, the court has determined that this opinion should not be published.

2 Defendants are attorneys general from the states of Texas, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Florida, Idaho, Illinois, Iowa, Kansas, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, Nevada, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Rhode Island, South Dakota, Tennessee, Vermont, Washington, West Virginia, Wisconsin, and Wyoming.

behalf, and all other persons having actual knowledge of this order" from

> initiating any enforcement action or actions pursuant to any provision of state law, which would seek to regulate or restrict any aspect of the individually named Plaintiff airlines' air fare advertising or their other operations involving their rates, routes and/or services.

Defendants timely appealed.

II. DISCUSSION

Defendants advance the following issues in this appeal:

> 1. Did the district court abuse its discretion by emjoining thirty-four sovereign state attorneys general (including Texas) from enforcing their individual state laws in a case where the district court lacks jurisdiction over the claims of each airline plaintiff because there is no case or controversy?
>
> 2. Did the district court abuse its discretion by enjoining these state attorneys general because the court lacked subject matter jurisdiction in fact over these attorneys general?
>
> 3. Did the district court abuse its discretion in granting the airlines' request for declaratory relief when it had no independent basis to exercise jurisdiction over the attorneys general?

4. Did the district court abuse its discretion by granting plaintiffs' motion for summary judgment or judgment on the pleadings when the record discloses that material questions of fact exist?

5. Did the district court abuse its discretion by never requiring plaintiffs to respond to each of the issues raised by the thirty-three states' motions to dismiss the amended complaint and never ruling on said motions, never allowing the states the right to answer the amended complaint and never allowing the states the right to develop through discovery facts to contradict plaintiffs' allegations regarding the claimed subject matter jurisdiction of the district court over each and every one of the state attorney general defendants?

6. Did the district court abuse its discretion by extending the scope if its final judgment and permanent injunction to include within its purview "all other persons having actual knowledge of this order"?

7. Did the district court abuse its discretion by permanently enjoining thirty-three sovereign state attorneys general over whom it lacks personal jurisdiction from enforcing their own state false and deceptive advertising and practices laws?

8. Did the district court abuse its discretion by permanently enjoining thirty-three attorneys general as to whom it has no jurisdiction because venue, as to these attorneys general, is not proper in the Western District of Texas because none of them reside in that district and, as to them, the claim, if any, did not arise in that district?

9. Did the district court abuse its discretion by permanently enjoining thirty-three sovereign attorneys general who were improperly held to be parties to the action because the district court does not have personal jurisdiction over these attorneys general?

10. Did the district court abuse its discretion by enjoining thirty-four sovereign state attorneys general from enforcing their state laws prohibiting false and deceptive advertising and practices against false airline advertising because it held that the states were preempted from so enforcing their laws by the terms of 49 U.S.C. section 1305(a)(1)?

11. Did the district court abuse its discretion by extending the permanent injunction to include intervenor Pan Am within its scope?[3]

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3 The discussion refers to the issues as here numbered.

For the reasons set forth below, this Court finds no abuse of discretion on any of these listed issues.

Under the law of the case doctrine, an appellate court can refuse to reexamine in a subsequent appeal of the same case issues which were decided either explicitly or by necessary implication in the prior opinion. **Conway v. Chemical Leaman Tank Lines, Inc.**, 644 F.2d 1059, 1061 (5th Cir. 1981). While use of the law of the case doctrine is not mandatory, a court is more likely to apply the doctrine when the prior opinion was apparently well-considered, as in the instant case. Defendants concede that the prior opinion, reported at 879 F.2d 773, became the law of the case with respect to the issues listed above as issues 7 through 12. This court agrees and will not reexamine issues 7 through 12. The law of the case doctrine also applies to other issues as well. In issue 1, Defendants claim that the district court lacked subject matter jurisdiction because of the lack of a case or controversy. Defendants' arguments on this issue are substantially the same as made in the prior appeal. While the prior opinion does not explicitly discuss it, the necessary assumption is that the prior panel found subject matter jurisdiction present. Otherwise, the panel would not have reached the merits and affirmed the preliminary injunction. This same rationale applies to the jurisdictional issue presented in issue 3. Defendants' arguments in the prior appeal on this issue were substantially the same and the panel implicitly found subject matter jurisdiction.

Issues 2, 3 and 5 reflect essentially the same argument. Defendants contend that the district court erred in granting summary judgment because there were unresolved fact issues. Defendants have failed

to point out any outstanding factual issue relevant to the judgment. The question of preemption, the cornerstone of the case, is a question of law which the district court could clearly resolve on the basis of the summary judgment evidence available. Further, Defendants' contention that there were unresolved fact issues necessary to determine the existence of subject matter jurisdiction is without merit. As discussed above, the prior panel evidently found subject matter jurisdiction without the need to resolve any fact issue.

Finally, Defendants argue in issue 6 that the permanent injunction is overly broad by encompassing "all other persons having actual knowledge of this order." The injunction clearly applies to Defendants and Defendants do not contend otherwise. This Court need not decide whether such language is overly broad, however, since Defendants have no standing to assert the rights of hypothetical third parties.

III. CONCLUSION

The Court finds no reversible error. The district court is affirmed.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS

AUSTIN DIVISION

TRANS WORLD AIRLINES, INC., CONTINENTAL AIRLINES, INC., and BRITISH AIRWAYS PLC, Plaintiffs,	§	
v.	§	CIVIL ACTION NO. A-89-CA-067 (consolidated)
JIM MATTOX, ATTORNEY GENERAL, STATE OF TEXAS, ET AL. Defendant.	§	

FINAL JUDGMENT

Pursuant to Rule 65 of the Federal Rules of Civil Procedure and after careful consideration of the Amended Complaint, the opinion of the United States Court of Appeals for the Fifth Circuit in Trans World Airlines, Inc. v. Mattox, 897 F.2d 773 (5th Cir. 1990), Plaintiffs' Motion for Judgment on the Pleadings, or for Summary Judgment, and for Entry of Final Judgment, the Defendants' response thereto, and the arguments of counsel, the Court finds that Plaintiffs will suffer immediate, irreparable and continuing injury if the attorneys general of the states of Texas, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Florida, Idaho, Illinois, Iowa, Kansas, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, Nevada, New York, North Carolina, North Dakota, Ohio, Oklahoma,

Oregon, Rhode Island, South Dakota, Tennessee, Vermont, Washington, West Virginia, Wisconsin, and Wyoming, or parties in concert or participating with them, are permitted to bring enforcement actions against Plaintiffs, or any of them, pursuant to their respective states' laws, in accordance with the Air Travel Industry Enforcement Guidelines ("Guidelines") adopted by the National Association of Attorneys General ("NAAG"), on account of Plaintiffs' air fare advertising and other promotional and informational advertising.

The Court finds and declares that the Defendants have committed acts as set forth in Plaintiffs' Amended Complaint, and will continue to do so unless restrained by this Court; that there is no genuine issue of material fact; that Plaintiffs are entitled to judgment as a matter of law; that any state regulation of advertising of the Plaintiffs' rates, routes, and services has been pre-empted by the Federal Aviation Act of 1958, as amended, 49 U.S.C. App. § 1305(a)(1); that subsection 2.5 of the NAAG Guidelines, which purports to require that "[a]ny fuel, tax, or other surcharge to a fare must be included in the total advertised price of the fare," conflicts with the Federal Government's regulatory scheme; and that continual threats of enforcement actions by the Defendant attorneys general and others in concert or participating with them would violate the Supremacy Clause of the United States Constitution. The Court determines that granting the requested injunctive relief does not pose an untoward burden on Defendants and, in fact, would be in the public interest.

The Court further finds it unnecessary to decide whether the threatened implementation or enforcement of the NAAG Guidelines through state

law by the defendant attorneys general, or by others in concert or participating with them through their respective states' laws, constitutes an undue burden on interstate and foreign commerce in violation of the Commerce Clause; violates the interstate compact clause (Art. I, § 10, cl. 3, U.S. Constitution); or violates Plaintiffs' First Amendment rights. Accordingly, it is

ORDERED that Plaintiffs' Motion for Judgment on the Pleadings, or for Summary Judgment, and for Entry of Final Judgment is GRANTED. It is further

ORDERED that the Attorneys General of the States of Texas, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Florida, Idaho, Illinois, Iowa, Kansas, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, Nevada, New York, North Carolina, North Dakota, Tennessee, Vermont, Washington, West Virginia, Wisconsin, and Wyoming, both individually and in their official capacities, their agents, servants, employees, and all other persons acting for the defendants in either capacity, and all other persons acting in concert or participating with the Defendants or on their behalf, and all other persons having actual knowledge of this order be and hereby are permanently enjoined from:

> initiating any enforcement action or actions pursuant to any provision of state law, which would seek to regulate or restrict any aspect of the individually named Plaintiff airlines' air fare advertising or their other operations involving their rates, routes and/or services.

It is further

ORDERED that this injunction will operate prospectively only and will not act to interfere with the continuation of the following pending proceedings:

A. Cause No. 609941, People v. Trans World Airlines, Inc., filed by Attorney General John K. Van De Kamp in the Superior Court of San Diego, California on march 9, 1989. This action was subsequently removed to Federal District Court for the Southern District of California which has since remanded this matter to the San Diego County, California Superior Court.

B. Cause No. 89-41703, People of the State of New York, ex rel Robert Abrams v. Trans World Airlines, Inc., filed by Attorney General Robert Abrams in the New York Supreme Court, New York County, on March 29, 1989. This action was subsequently removed to Federal District Court for the Southern District of New York which has since remanded this matter to the New York County, New York Supreme Court.

C. Cause No. 89-CV-567, State of Kansas, ex rel Robert T. Stephan v. Trans World Airlines, Inc., filed by Attorney General Robert T. Stephan in the District Court of Shawnee County, Kansas, Division 2, on April 3, 1989. This action was subsequently removed to Federal District Court for the District of Kansas which has since remanded this matter to the Shawnee County, Kansas District Court.

D. Cause No. 89 CIV 2425 Pan American World Airways, Inc. v. Robert Abrams, as Attorney General of the State of New York, filed by Pan American World Airways, Inc. in the Southern District Court of New York on April 11, 1989.

E. Cause No. 89-42223, The People of the State of New York, ex rel Robert Abrams v. Pan American World Airways, Inc., filed by Attorney General Robert Abrams in New York Supreme Court, New York County on April

20, 1989. This action was subsequently removed to Federal District Court for the Southern District of New York which has since remanded this matter to the New York County, New York Supreme Court.

It is further

ORDERED that Plaintiffs shall recover of the Defendants the costs of this action.

SIGNED this 1st day of June, 1990.

/s/ Walter S. Smith,Jr.
WALTER S. SMITH, JR.
UNITED STATES DISTRICT JUDGE

TRANS WORLD AIRLINES, INC., et al., Plaintiffs-Appellees,

v.

Jim MATTOX, Attorney General of the State of Texas, Defendant-Appellant.

TRANS WORLD AIRLINES, INC., et al., Plaintiffs-Appellees,

v.

Jim MATTOX, Attorney General of the State of Texas, et al., Defendants-Appellants.

TRANS WORLD AIRLINES, INC., et al., Plaintiffs-Appellees,

Pan American World Airways, Intervening-Plaintiff-Appellee,

v.

Jim MATTOX, Attorney General of the State of Texas, et al., Defendants-Appellants

Nos. 89-1142, 89-1509 and 89-1610.

United States Court of Appeals, Fifth Circuit.

April 3, 1990.

Appeals from the United States District Court for the Western District of Texas.

Before LIVELY,* JOLLY and HIGGINBOTHAM, Circuit Judges.

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* Circuit Judge of the Sixth Circuit, sitting by designation.

LIVELY, Circuit Judge.

The dispositive question in these consolidated appeals is whether state laws proscribing deceptive advertising are preempted by federal law when the state attempts to enforce such laws against the advertising of fares by interstate and international airlines. Three separate appeals were consolidated for oral argument. We refer to the cases by their Court of Appeals numbers.

In number 89-1142, the Defendant-Appellant is Jim Mattox, the Attorney General of Texas. The Plaintiffs-Appellees are Trans World Airlines, Inc. (TWA), Continental Airlines, Inc. (Continental) and British Airways, PLC (British Air).

In numbers 89-1509 and 89-1610, the Defendants-Appellants are the attorneys general of Texas and thirty-three other states. The Plaintiffs-Appellees are TWA, Continental, British Air, Pan American World Airways, Inc. (Pan Am) and ten other airlines.

We affirm the orders appealed from in each of the three appeals.

I. *Background*

A. History of Proceedings

Number 89-1142:

In December 1987, the National Association of Attorneys General (NAAG) adopted guidelines related to airline advertising. The guidelines provide that any fuel, tax or other surcharge to air fare must be included in the total advertised price of the fare. The guidelines are not law.

On November 14, 1988, the attorneys general of Texas and four other states sent letters to TWA, Continental and British Air, notifying them that some of their advertisements violated the NAAG guidelines and these states' false advertising and deceptive practices laws. The letters charged that the airlines had attempted to make their fares appear lower than those of their competitors by prominently advertising the ticket price, while less prominently disclosing taxes, surcharges and fees.

In particular the Attorney General of Texas stated that the airlines had violated the Texas Deceptive Trade Practices Act. The Attorney General advised the airlines that advertising a specific amount for a fare was deceptive if the advertised amount did not reflect the true cost of travel because certain surcharges had not been included in the advertised fare. The letter threatened prosecution.

In January 1989, TWA, Continental and British Air filed suit in the United States District Court for the Western District of Texas to enjoin the Attorney General of Texas from enforcing the Texas Deceptive Trade Practices Act against their advertising.

Following a hearing, the district court granted a preliminary injunction. 712 F.Supp. 99. The court found it probable that the plaintiffs would prevail in establishing their claims that any state regulation of advertising related to the airlines' rates, routes and services had been preempted by federal law. The injunction forbade the Attorney General of Texas and all other persons acting in concert with him from initiating any enforcement action under state law, "which would seek to regulate or restrict any aspect of the individually named plaintiff airlines' air fare advertising or the operations involving their rates, routes and/or services." The district court later clarified its injunction by stating that it applied only to the Attorney General of Texas and to the laws of Texas. In number 89-1142, the Attorney General of Texas appeals from the order granting the preliminary injunction.

Number 89-1509:

On March 16, 1989, the plaintiffs TWA, Continental and British Air filed a motion to broaden the preliminary injunction to include the attorneys general of thirty-three other states who had adopted the NAAG guidelines on airline advertising and who had appeared in a hearing in number 89-1142.

On April 27, 1989, the district court issued an order granting the motions of ten other airlines to intervene as plaintiffs. The court also granted the plaintiffs permission to amend their complaint to add as defendants the attorneys general of the thirty-three other states who had appeared in the action. The court then broadened the preliminary injunction to include the attorneys general of the other thirty-three states.

The district court noted that since the injunction had been issued on January 30, 1989, against the Attorney General of Texas, suits had been filed by the Attorneys General of California, Kansas and New York against TWA seeking to force the airline to comply with state laws concerning advertising. Also, the Attorney General of Texas had filed a similar suit against Pan Am. The broadened injunction acted prospectively and did not affect these pending state court cases against TWA and Pan Am. The thirty-four attorneys general appeal this broadening order in number 89-1509.

Number 89-1610:

After the Attorney General of Texas sued Pan Am in state court, charging deceptive practices, Pan Am removed the case to the United States District Court for the Northern District of Texas. Attorney General Mattox objected to removal to federal court and moved to remand the case to state court. His motion was denied. This case was then transferred to the United States District Court for the Western District of Texas. On May 30, 1989, the District Court for the Western District consolidated this removed case with number 89-1509. The court issued an order granting Pan Am's motion to intervene in number 89-1142 and broadening the preliminary injunction to include Pan Am among the airlines against whom the enjoined states could take no new action. The thirty-four state attorneys general appeal this order of the district court in number 89-1610.

B. Brief Overview of Federal Regulation (and Deregulation)

The framework for federal regulation of civil aviation was set forth in the Civil Aeronautics Act of

1938, Ch. 601, 52 Stat. 973 (1938). This statute created the Civil Aeronautics Authority, whose name was changed to the Civil Aeronautics Board (CAB) in 1940, and vested it with broad powers to regulate commercial aviation. Included in that portion of the statute dealing with economic regulation was section 411, which gave the Authority the power to determine if any carrier engaged in unfair or deceptive practices or unfair methods of competition. *Id*. at 1003. The statute also contained a savings clause in section 1106, which stated that nothing contained in the Act would "abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies." *Id*. at 1027.

The Federal Aviation Act of 1958, Pub.L. No. 85-726, 72 Stat. 731 (1958) (the Act), continued the CAB and created the Federal Aviation Agency (FAA). The Act reenacted section 411 as it appeared in the Civil Aeronautics Act of 1938, except for substitution of "Board" for "Authority." It also reenacted section 1106, which provided that other common law and statutory remedies remained viable.

Congress enacted the Airline Deregulation Act in 1978. Pub.L. No. 95-504, 92 Stat. 1705 (1978) (Deregulation Act). The purpose of this statute was to encourage and develop an air transportation system that "relies on competitive market forces to determine the quality, variety, and price of air services." *Id*. The Deregulation Act directed the CAB to consider a number of factors to be in the public interest, including "[t]he prevention of unfair, deceptive, predatory, or anti-competitive practices in air transportation." *Id*. at 1706. The Deregulation Act did not change sections 411 or 1106 of the existing

statute, but did add a federal preemption provision. Section 105 stated that "no State or political subdivision thereof and no interstate agency or other political agency of two or more States shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier." *Id*. at 1707-08.

The House Committee on Public Works and Transportation noted that "[e]xisting law contains no specific provision on the jurisdiction of the States and the Federal Government over airlines which provide both intrastate and interstate service. The lack of specific provisions has created uncertainties and conflicts. . . ." H.R.Rep. No. 1211, 95th Cong., 2d Sess. 15-16 (1978), *reprinted in* 1978 U.S.Code Cong. & Admin.News 3737, 3751-52. The Committee intended section 105 to "prevent conflicts and inconsistent regulations by providing that when a carrier operates under authority granted pursuant to title IV of the Federal Aviation Act, no State may regulate that carrier's routes, rates or services." H.R.Rep. No. 1211 at 16; 1978 U.S.Code Cong. & Admin.News at 3752.

The Deregulation Act also contained "sunset provisions" terminating some of the CAB's authority and transferring some authority to the Department of Transportation (DOT) and other federal departments. The sunset provisions neither terminated nor transferred the CAB's authority under section 411.

In 1980, Congress amended section 102 of the Act by adding a more comprehensive treatment of matters to be considered in the public interest. This treatment contains a new emphasis on "maximum reliance on competitive market forces and on actual

and potential competition" to achieve the goals of safe, efficient and economic air transportation. Pub.L. No. 96-192, 94 Stat. 35 (1980). However, since 1938 it has been in the public interest for the CAB to promote adequate, economical and efficient air service without unfair or destructive competitive practices. 52 Stat. 980; 49 U.S.C.App. § 1302(a)(3). And, since 1978 "the prevention of unfair, deceptive, predatory or anticompetitive practices" has been in the public interest. 92 Stat. 1706; 49 U.S.C.App. § 1302(a)(7).

Finally, Congress enacted the Civil Aeronautics Board Sunset Act of 1984, Pub.L. No. 98-443, 98 Stat. 1703 (1984) (Sunset Act). This law terminated or transferred the remaining functions of the CAB and provided for its demise. Sections 411 and 1106 of the original Act were neither terminated nor transferred. However, the Sunset Act contained a provision that all authority of the CAB neither terminated on or before January 1, 1985, nor otherwise transferred, was transferred by law to DOT. *Id.* at 1704. The Sunset Act made no material changes in sections 105 and 411, the preemption provision and the section dealing with "unfair or deceptive practices or unfair methods of competition," respectively. They are codified now as 49 U.S.C.App. §§ 1305 and 1381. Section 12 of the Sunset Act added savings provisions that continued in effect all rules, regulations, orders and determinations of the CAB and gave the same authority as held by the CAB to any agency to which CAB functions were transferred. These provisions are codified now as 49 U.S.C.App. § 1556. It also retained section 1106, now codified as 49 U.S.C.App. § 1506.

The House Committee on Public Works and Transportation noted that there was a need to clarify the status of some of the CAB's authority after sunset. H.R.Rep. No. 793, 98th Cong., 2d Sess. 1, 3 (1984), *reprinted in* 1984. U.S.Code Cong. & Admin.News 2857, 2859. The sunset provisions of the 1978 Deregulation Act did not deal with the authority to protect consumers and to prevent unfair competitive practices. H.R.Rep. No. 793 at 3; 1984 U.S.Code Cong. & Admin.News at 2859. The Committee concluded that this important authority should be continued and should be exercised by DOT. H.R.Rep. No. 793 at 4-6; 1984 U.S.Code Cong. & Admin.News at 2860-62. The following passages in the report are of particular interest:

> In addition to protecting consumers, federal regulation insures a uniform system of regulation and preempts regulation by the states. If there was no Federal regulation, the states might begin to regulate these areas, and the regulations could vary from state to state. This would be confusing and burdensome to airline passengers, as well as to the airlines.

H.R.Rep. No. 793 at 4; 1984 U.S.Code Cong. & Admin.News at 2860.

> The Committee has determined that the Department of Transportation is the most appropriate agency to administer CAB's consumer protection and unfair competitive practice authorities. Under the ADA, DOT will get CAB's authority to protect consumers and competitors insofar as international aviation and essential air service (EAS) are involved, and it would be confusing and inefficient to have DOT protect consumers and carriers in international and EAS

> operations, and another agency, such as FTC, protect consumers and carriers in other domestic operations. Airline flights frequently are not limited to one of these categories. Some airline flights provide both essential air transportation and other domestic transportation and other flights provide both domestic and international service. If two agencies shared authority for consumer protection, the rules could shift in mid-flight.

H.R.Rep. No. 793 at 6; 1984 U.S.Code Cong. & Admin.News at 2862. The concerns expressed by the Committee with respect to divided authority by more than one federal agency would appear equally valid with respect to a division of authority between the federal government and the states.

II

The Supreme Court has considered claims of preemption in many contexts, and has developed an analytical framework for deciding such claims. The Court recently wrote:

> The circumstances in which federal law pre-empts state regulation are familiar. See *Arkansas Elec. Coop. Corp. v. Arkansas Public Serv. Comm'n*, 461 U.S. 375, 383 [103 S.Ct. 1905, 1912, 76 L.Ed.2d 1] (1983). See also *Fidelity Federal Savings & Loan Assn. v. De la Cuesta*, 458 U.S. 141, 152-154 [102 S.Ct. 3014, 3022-3023, 73 L.Ed.2d 664] (1982). A pre-emption question requires an examination of congressional intent. *Id.*, at 152 [102 S.Ct., at 3022]. Of course, Congress explicitly may define the extent to which its enactments pre-empt state law. See, *e.g.*, *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 95-96 [103 S.Ct. 2890, 2898-2899, 77 L.Ed.2d 490] (1983). In the absence of explicit statutory language, however, Congress implicitly may

> indicate an intent to occupy a given field to the exclusion of state law. Such a purpose properly may be inferred where the pervasiveness of the federal regulation precludes supplementation by the States, where the federal interest in the field is sufficiently dominant, or where "the object sought to be obtained by the federal law and the character of obligations imposed by it . . . reveal the same purpose." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 [67 S.Ct. 1146, 1152, 91 L.Ed. 1447] (1947). Finally, even where Congress has not entirely displaced state regulation in a particular field, state law is pre-empted when it actually conflicts with federal law. Such a conflict will be found "'when it is impossible to comply with both state and federal law, *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143 [83 S.Ct. 1210, 1217-1218, 10 L.Ed.2d 248] (1963), or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress, *Hines v. Davidowitz*, 312 U.S. 52, 67 [61 S.Ct. 399, 404, 85 L.Ed. 581] (1941).'" *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 581 [107 S.Ct. 1419, 1425, 94 L.Ed.2d 577] (1987), quoting *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 [104 S.Ct. 615, 621, 78 L.Ed.2d 443].

Schneidewind v. ANR Pipeline Co., 485 U.S. 293, 299-300, 108 S.Ct. 1145, 1150-1151, 99 L.Ed.2d 316 (1988). See also, *Chrysler Corp. v. Texas Motor Vehicle Comm'n*, 755 F.2d 1192, 1205 (5th Cir.1985).

We look first to see if state laws pertaining to deceptive advertising have been expressly preempted by federal law when applied to fare advertising by interstate and international airlines. It will be necessary to consider preemption by implication only if we find no express preemption.

A.

The airlines contend that section 105(a)(1) of the Act expressly preempts state laws pertaining to the advertising of fares by airlines. Section 105, as noted, was added to the Act in 1978 by the Deregulation Act. Section 105(a)(1), states:

> (a) Preemption
>
> (1) Except as provided in paragraph (2) of this subsection, no State or political subdivision thereof and no interstate agency or other political agency of two or more States shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier having authority under subchapter IV of this chapter to provide interstate air transportation.

49 U.S.C.App. § 1305(a)(1) (1988). The exception in paragraph (2), referred to in the quoted text, has no application to this case.

The Attorney General of Texas, joined by the other state attorneys general in their briefs, argues that the state has the power to regulate the deceptive advertising of fares by airlines, and that federal law does not preempt his right to enforce state law. He contends that section 105 only preempts state regulations relating to the rates, routes or services of airlines, but does not expressly preclude state regulations relating to all airline operations. He maintains that state regulation of deceptive fare advertising by airlines does not relate to rates, routes or services. Attorney General Mattox argues that the legislative history of section 105 does not indicate congressional intent to preempt state regulation of

deceptive fare advertising by airlines. Such regulation by the states protects the competitive functioning of the market place, he contends, and was not within the scope of state regulations that Congress intended to preempt.

The airlines respond that section 105 preemption applies to all laws "relating to rates, routes, or services" of airlines, and that the advertising of fares by airlines clearly relates to rates. Thus, the airlines argue that the district court correctly enjoined the state attorneys general from enforcing the various state laws. In addition, they note that section 411 of the Act, 49 U.S.C.App. § 1381, empowers DOT to regulate "unfair or deceptive practices or unfair methods of competition in air transportation or the sale thereof."

B.

In our discussion we refer to the sections of the Act by their presently codified numbers. We conclude that state laws proscribing deceptive advertising are preempted by § 1305(a)(1) when a state attempts to enforce such laws against the advertising of fares by interstate and international airlines. Neither the Supreme Court nor any court of appeals has decided this precise issue. Two courts of appeals, however, have found express preemption of certain aspects of airline operations. See *Illinois Corporate Travel v. American Airlines*, 889 F.2d 751 (7th Cir.1989) and *New England Legal Foundation v. Massachusetts Port Auth.*, 883 F.2d 157 (1st Cir.1989). These courts of appeals have particularly relied upon the Supreme Court's construction of section 514(a) of the Employee Retirement Income Security Act of 1974 (ERISA) which preempts all state laws "insofar as they . . . relate to any employee benefit plan." *Shaw v. Delta*

Air Lines, 463 U.S. 85, 91, 103 S.Ct. 2890, 2896, 77 L.Ed.2d 490 (1983). In *Shaw* the Court concluded that Congress used "relate to" in the broad sense and that any law "'relates to' an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan." *Id.* at 96-98, 103 S.Ct. at 2899-2901.

Illinois Corporate Travel was an action brought by a travel agent against American Airlines, in which the travel agent asserted a federal antitrust claim and three state law claims. One of the state law claims was based on the Illinois Consumer Fraud and Deceptive Business Practices Act, and the others were based on common law. 889 F.2d at 752, 754. The travel agent had advertised that it offered discounts on American's tickets, and American attempted to stop such discount price advertising by denying the travel agent access to the plate used to issue tickets for the airline and by informing other airlines that it would not accept tickets that the travel agent wrote using their plates. American also issued an addendum to the agreement all travel agents must sign forbidding those selling its tickets to advertise that they offer discounts. *Id.* at 752.

The Seventh Circuit affirmed the district court's decision to dismiss two of the state law claims because they were preempted by § 1305(a)(1). Noting the Supreme Court's observations in *Shaw*, the court stated, "Price advertising surely 'relates to' price; the 'relating to' language in § 1305(a)(1) substantially increases the extent of preemption." *Id.* at 754. The court also disposed of the travel agent's argument that the language in § 1506 (the "savings clause") preserved the state law claim. The court held that this section preserves state law claims from implicit

preemption, but not from express preemption. If a state law relates to "rates, routes, or services," it is preempted; "the absence of contrary federal law is irrelevant." *Id.*

In *New England Legal Foundation*, the court of appeals reversed a district court decision that the state authority could enact a landing fee scheme that created great disparity between user fees charged smaller and larger aircraft. 883 F.2d at 175. There were many issues in the case, but its outcome turned on the determination of DOT's role after deregulation and the application of § 1305(a)(1). Administrative proceedings were begun before an ALJ prior to institution of the district court action. DOT and the district court reached contrary conclusions concerning the validity of the landing fee scheme. *Id.* at 171.

The court of appeals concluded that DOT had primary jurisdiction and that the district court should have deferred to DOT's interpretation of § 1305(a)(1). The court noted that the CAB's regulatory responsibilities that survived deregulation were assigned to DOT, and stated:

> In reducing federal economic regulation of the field to allow the forces of free competition to rule the marketplace, Congress obviously did not intend to leave a vacuum to be filled by the Balkanizing forces of state and local regulation. Congress expressly preempted state and local regulation by enacting § 105(a), which specifically provides that "no state or political subdivision thereof . . . shall enact or enforce any law, rule, regulation, standard, or other provision . . . relating to rates, routes, or services of any air carrier. . . ." 49 U.S.C.App. § 1305(a).

Id. at 173. The court concluded that the landing fee scheme was preempted by § 1305(a)(1). *Id.* at 175.

In addition, without referring to *Shaw*, this court and other courts of appeals have found express preemption under § 1305(a)(1).

This court concluded in *O'Carroll v. American Airlines*, 863 F.2d 11 (5th Cir.), *cert. denied*, — U.S. —, 109 S.Ct. 3158, 104 L.Ed.2d 1021 (1989) that § 1305(a)(1) preempted state law claims for damages by a passenger who was excluded from a flight after creating a disturbance on a plane. The court found that this section expressly preempted the state laws relied upon by the plaintiff, thus making consideration of implied preemption unnecessary. *Id.* at 13.

Two courts have found that § 1305(a)(1) preempted state laws concerning the treatment of handicapped passengers. In *Hingson v. Pacific Southwest Airlines*, 743 F.2d 1408 (9th Cir.1984), the court of appeals affirmed a directed verdict for the airline on a blind passenger's state law claims for discrimination in seating. The court found that state anti-discrimination laws were preempted as "relating to" services within the meaning of § 1305(a)(1). *Id.* at 1415. Accord *Anderson v. USAir*, 818 F.2d 49 (D.C.Cir.1987).

C.

The attorneys general cite three recent decisions by federal district courts concerning state regulation of the advertising of fares by airlines: *New York v. Trans World Airlines*, 728 F.Supp. 162 (S.D.N.Y.1989); *California v. Trans World Airlines*, 720 F.Supp. 826 (S.D.Cal.1989); and *Kansas v. Trans*

World Airlines, 730 F.Supp. 366 (D.Kan.1990). In each case, the state attorney general filed a state court suit against the airline, alleging that the airline's advertising of fares violated state deceptive practices laws. The airline removed the case to federal court. Then, the attorney general moved to remand the action to state court, and the district court granted the motion.

In *New York*, the court found that § 1305(a)(1) does not expressly preempt the State's enforcement of its deceptive practice laws concerning airline advertising. 728 F.Supp. at 176. The court concluded that any relationship between New York's enforcement of its laws against deceptive advertising and an airline's rates, routes and services is remote and indirect. *Id.* at 176. The court expressed concern that a finding that § 1305(a)(1) preempted New York law might "doom every state regulation affecting airlines." *Id.* at 176.

The district court in *California* made the following observation:

> In the instant case, plaintiff [state attorney general] could not bring an action under the Federal Aviation Act or its counterparts to enjoin the alleged false advertising. It appears from the statute that only the Administrator of the FAA may institute a civil action against an airline for a violation of the statute. See 49 U.S.C.A.App. § 1471. In fact, the whole contention of defendant [airline] is that the Department of Transportation (DOT) has sole authority to enforce alleged unfair advertising. Assuming arguendo that state regulation of airline advertising were preempted, since the Federal Aviation Act gives plaintiff no cause of action, plaintiff may bring a suit to enforce its alleged right in state court, and such a

case "arises under" state law only. *See Franchise Tax Board*, [*v. Construction Laborers Vacation Trust*, 463 U.S. 1, 103 S.Ct. 2841, 77 L.Ed.2d 420 (1983)], *supra*.

California, 720 F.Supp. at 828.

In *Kansas*, the court found:

> TWA has not met its burden of demonstrating clear congressional intent to make cases such as the present one removable. The court finds that the language of the preemption section precluding state regulation "relating to rates, routes or services" does not by its terms include advertising. [Citation omitted]. The Court accordingly finds that the Act does not provide a basis for removal under the "complete preemption" exception to the well-pleaded complaint rule. [Citation omitted].

Kansas, 730 F.Supp. at 368.

In addition, the attorneys general rely on *People v. Western Airlines*, 155 Cal.App.3d 597, 202 Cal.Rptr. 237 (Cal.Ct.App.1984), *cert. denied*, 469 U.S. 1132, 105 S.Ct. 815, 83 L.Ed.2d 808 (1985). There the court noted that Congress had granted the CAB broad authority to regulate unfair competition and deceptive practices by airlines, but the court concluded that there was no inherent conflict between this authority and California's enforcement of its false advertising laws against interstate air carriers. 202 Cal.Rptr. at 238-39. This decision appears to turn on a finding of no implied preemption, rather than an examination of § 1305 to determine whether Congress had expressly preempted the state law action.

Also, the attorneys general cite *Nader v. Allegheny Airlines*, 426 U.S. 290, 96 S.Ct. 1978, 48 L.Ed.2d 643 (1976), in which the Court held that a common-law tort action for fraudulent misrepresentation was not preempted by reason of the CAB's authority over "deceptive practices" under § 1381. However, *Nader* was decided prior to the addition of § 1305 to the Act. Thus, there was no basis for a finding of express preemption at the time of the decision.

D.

Unlike the district courts in *New York*, *California* and *Kansas*, we believe the history of federal legislation regulating airlines demonstrates the intent of Congress to expressly preempt state regulation of airline fare advertising, leaving no right of action that arises under state law only. See discussion of remand in relation to Pan Am in Part V, *infra*. From the Civil Aeronautics Act of 1938 until the Deregulation Act of 1978, Congress gave the CAB vast powers of economic regulation over the airline industry, including the regulation of rates, routes and services. See 52 Stat. 973 (1938); 72 Stat. 731 (1958); 92 Stat. 1705 (1978). The Deregulation Act restricted the CAB's authority to regulate some of these areas. In changing the longstanding role of the CAB, Congress acknowledged that these changes could cause confusion concerning federal and state roles in airline regulation. Specifically, the House Committee on Public Works and Transportation observed that the Deregulation Act lacked specific provisions concerning state and federal jurisdiction over airlines, and thereby created "uncertainties and conflicts" in this regard. H.R.Rep. No. 1211 at 15-16; 1978 U.S.Code Cong. & Admin.News at 3751. By

including § 1305 in the Deregulation Act to preempt state regulation of airline routes, rates or services, Congress hoped to "prevent conflicts and inconsistent regulations." H.R.Rep. No. 1211 at 16; 1978 U.S.Code & Cong. & Admin.News at 3752.

Subsequent legislation has confirmed the intent of Congress to preempt state regulation of airline fare advertising. Since the enactment of the Deregulation Act, Congress has retained § 1305. Through the Sunset Act of 1984, Congress transferred to DOT the CAB's power to control unfair or deceptive trade practices under § 1381. 49 U.S.C.App. § 1551(b)(1)(E). In so doing, Congress intended to protect consumers by providing a uniform system of federal regulation of unfair or deceptive practices by airlines. The House Committee on Public Works and Transportation stated that "federal regulation insures a uniform system of regulation and preempts regulation by the states. If there was no federal regulation, the states might begin to regulate these areas, and the regulations could vary from state to state. This would be confusing and burdensome to airline passengers, as well as to the airlines." H.R.Rep. No. 793 at 4; 1984 U.S.Code Cong. & Admin.News at 2860.

Given the history of congressional concern and the inclusion of specific preemption language in the Deregulation Act, we agree with the Seventh Circuit in *Illinois Corporate Travel* that airline fare advertising "relates to" rates within the meaning of § 1305(a)(1). Although the state laws against deceptive advertising are not aimed specifically at airlines, and clearly do not attempt to set rates, the conclusion is inescapable that such laws do "relate to" rates when applied to airline fare advertising. As the Supreme

Court noted in *Shaw*, a law relates to a particular subject "if it has a connection with or reference to" that subject. 463 U.S. at 96-97, 103 S.Ct. at 2899-2900. It cannot be gainsaid that enforcement of a state law regulating fare advertising by airlines has a connection with or reference to rates within the meaning of § 1305(a)(1). Therefore, such state action is expressly preempted by § 1305(a)(1).

The attorneys general remind us that § 1506, which preserves remedies that exist at common law and by state statute, also survived the Sunset Act. They contend that this provision enables them to enforce their states' deceptive advertising laws as an additional remedy to those provided by the Act. However, in a case involving the express preemption of airline services, this court found that § 1305 clearly indicated congressional intent to preempt and controlled over a state law claim submitted under § 1506. *O'Carroll*, 863 F.2d at 13. In the present case involving the advertising of fares by airlines, we follow the reasoning in *O'Carroll* and agree with the Seventh Circuit in *Illinois Corporate Travel*; § 1506 does not preserve state law remedies when there is express preemption under § 1305. See *Hingson*, 743 F.2d at 1416 n. 11.

In summary, we believe it is clear that by enacting §1305 Congress intended to retain in the federal government, exclusive authority over airline advertising of fares. It is not as though Congress had left a vacuum which the states needed to fill in order to protect their citizens. The provisions of the Act under which the CAB regulated unfair or deceptive practices of airlines, particularly § 1381, were neither terminated nor transferred to other agencies; they were transferred by operation of law to DOT. Thus,

DOT inherited the CAB's role under § 1381 with respect to unfair and deceptive practices. With the advent of deregulation and the demise of the CAB, Congress continued to vest authority over such practices in a federal agency. Congress provided for its concern that consumers of airline services be protected under a uniform system of regulation by adding § 1305. This express preemption provision was intended "to prevent conflicts and inconsistent regulations" concerning airline advertising of fares, which relates to rates within the meaning of the provision.

Having concluded that § 1305(a)(1) expressly preempts state deceptive advertising laws as applied to airline fare advertising, we do not reach the parties' arguments concerning implied preemption.

III.

The attorneys general also argue that the airlines failed to meet the burden of proving the requirements for granting a preliminary injunction and, therefore, the district court abused its discretion by issuing the preliminary injunction against enforcement of the various state laws. As we have indicated, enforcement actions by the states are preempted; thus, the airlines have demonstrated a substantial likelihood of success on their claim for a permanent injunction. Likelihood of success is the first requirement for granting a preliminary injunction. The other three requirements are: (2) a substantial threat of irreparable injury if the injunction is not granted; (3) that the threatened injury to the one seeking the injunction outweighs any damage it may cause the other party; and (4) that the injunction will not be against the public interest.

Plains Cotton Coop. Ass'n v. Goodpasture Computer Service, 807 F.2d 1256, 1259 (5th Cir.), *cert. denied*, 484 U.S. 821, 108 S.Ct. 80, 98 L.Ed.2d 42 (1987). Under the facts of this case we believe the finding with respect to likelihood of success carries with it a determination that the other three requirements have been satisfied.

Congress has exercised its authority under the Commerce Clause to regulate airlines and by adopting § 1305 has chosen to preempt all enforcement of state laws relating to rates, routes or services of airlines. Congress has declared that it is in the public interest for a federal agency to guard against unfair or deceptive practices by airlines. If the states were permitted to enforce their various laws, the airlines would be subjected to the demands and criteria of numerous legislatures rather than being required to comply only with federal laws and regulations. This would cause irreparable injury by depriving the airlines of a federally created right to have only one regulator in matters pertaining to rates, routes and services. The appellants miss the thrust of the airlines' argument by contending that the only threatened injury is a loss of revenue, which is not irreparable. We conclude that permitting states to regulate airline advertising in the face of the preemption language of § 1305(a)(1) would violate the Supremacy Clause, causing irreparable injury to the airlines. Therefore, the second requirement for an injunction is satisfied.

With regard to the third requirement, there is no injury to the states to weigh against that which they threaten to inflict on the airlines. Since Congress expressly preempted this area of regulation, the states are not injured by the injunction.

Finally, the fourth requirement is satisfied by the finding of Congress that exclusive federal regulation in matters relating to airline rates, routes or services is in the public interest.

We conclude that the airlines met their burden of proving the four requirements and the district court properly issued the preliminary injunction.

IV.

In number 89-1509 the attorneys general of thirty-three states[1] appeal from the order of the district court broadening the preliminary injunction to include them and permitting the airlines to name and serve them as additional defendants in the pending action against the Attorney General of Texas. The Attorney General of Texas also appeals from this order.

A.

A brief outline of the background and participation of these attorneys general in the *TWA v. Mattox* litigation is in order.

In June 1987, as a result of a resolution co-authored by the Attorney General of Texas, the NAAG appointed a task force to study the advertising

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1 Kansas, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Florida, Idaho, Illinois, Iowa, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, Nevada, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Rhode Island, South Dakota, Tennessee, Vermont, Washington, West Virginia, Wisconsin and Wyoming.

and marketing practices of the airline industry in the United States.

In a letter dated October 19, 1987, DOT informed the Attorney General of California that a number of the proposed NAAG guidelines concerning airline advertising appeared to be preempted by federal law.

In December 1987, the NAAG adopted the guidelines. On February 3, 1988, the attorneys general of Texas and six other states wrote several airlines threatening "protracted litigation" to bring their advertisements into compliance with the guidelines. In a March 2, 1988, letter from DOT to the Attorney General of Texas, DOT stated that state regulation of fare advertising by airlines, as set forth in the guidelines, was preempted by federal law.

On November 14, 1988, the Attorney General of Texas sent a letter to Plaintiffs TWA, Continental and British Air on behalf of the states of California, Massachusetts, New York, Texas and Washington. The letter stated that it was the position of the states that any fuel tax or other surcharge to air fare must be included in the total advertised price. The attorneys general indicated an intent to sue the airlines under their respective state laws.

TWA, Continental and British Air commenced this action against the Attorney General of Texas on January 23, 1989, and moved for a temporary restraining order (TRO). On January 24, 1989, the Attorney General of Texas notified four states of the suit and advised them that the suit could restrict all states from enforcing their laws against airlines. Other states were also informed.

On January 27, 1989, the date of the hearing on the TRO, thirty-three states filed a motion, which reads in pertinent part:

> Motion of Specially Appearing States to Deny Plaintiffs' Motion for Temporary Restraining Order or in the Alternative Motion to Extend Date for Hearing on Temporary Order
>
> Without admitting or submitting to the subject matter jurisdiction of this Court and without admitting that this Court has personal jurisdiction over them, the states of Kansas, Alaska, . . . Wyoming specially appear before this Court to move for an order denying the plaintiffs' motion for a temporary restraining order or in the alternative to ask this Court to set a future date upon which to hear plaintiffs' motion as a noticed motion for temporary restraining order.

The attorneys general stated in their motion that they had been "informed" that the airlines were seeking a TRO "that could have the effect of prohibiting such states from enforcing their own laws even though they were not named as defendants nor served by plaintiffs with a copy of the action currently before this Court."

The Attorney General of Kansas then participated in the TRO hearing. After the Assistant Attorney General of Texas had argued against entry of a TRO, the Attorney General of Kansas addressed the court. He stated that he appeared for the purpose of responding on behalf of thirty-four state attorneys general. He argued that the other attorneys general were not responsible for the individual actions of the states of Texas and Kansas under those states' consumer protection laws—attorneys general cannot

act in concert with one another except to the extent their laws are similar. He argued that since each state acted individually to enforce its laws, the states could not be sued collectively "unless there's something that would bring the state under the umbrella of some kind of federal action. And states don't set rates, rules and regulations. . . . The bottom line . . . is that individual states should not be precluded in advance as they consider enforcement of their state law in their state court."

The district court denied motions to stay and on January 30, 1989, issued the preliminary injunction prohibiting the Attorney General of Texas from initiating any enforcement action to regulate the advertising of fares by TWA, Continental or British Air. Attorney General Mattox appealed on February 10, 1989 (No. 89-1142). On February 14, 1989, the Attorney General of Kansas filed a motion to clarify the injunctive order. He requested the court to enter a "Substituted Order," which he attached to the motion. On February 27, 1989, the district court entered an order granting the Kansas motion. It stated:

> The Court's Order of January 30, 1989 does not apply to any Attorney General of any state, commonwealth, territory, or the District of Columbia, other than Jim Mattox, Attorney General of Texas, nor does that order apply to any law other than the laws of the State of Texas.

On March 16, 1989, TWA, Continental and British Air filed a motion to broaden the preliminary injunction to include the attorneys general of thirty-three other states who had adopted the NAAG guidelines on airline advertising and who "specially appeared" in the TRO hearing in January. On March

29, 1989, ten additional airlines filed a motion for leave to intervene. Copies of the motions to broaden the preliminary injunction and to permit additional airlines to intervene were sent to the Attorneys General of Texas and Kansas. Neither motion was served on any of the attorneys general of the other thirty-two states.

On April 4, 1989, the Attorney General of Kansas filed a response denying that the district court had subject matter or personal jurisdiction over him.

On April 27, 1989, the district court filed an order broadening the preliminary injunction to include the attorneys general of the other thirty-three states. Also, the court granted the motions of the ten other airlines to intervene as plaintiffs.

The district court noted that since the injunction was issued on January 30, 1989, against the Attorney General of Texas, suits had been filed by the Attorneys General of California, Kansas and New York against TWA seeking to force the airline to comply with state laws concerning advertising. Also, the Attorney General of Texas had filed a similar suit against Pan Am.

The district court granted the plaintiffs leave to amend their complaint to include those attorneys general who, acting in concert with Attorney General Mattox or among themselves, were attempting to use state law to enforce the NAAG guidelines relating to airline advertising. This injunction operates prospectively and does not act to interfere with the four cases mentioned above.

B.

Unlike subject matter jurisdiction, jurisdiction over the person can be waived. *Cactus Pipe & Supply Co. v. M/V Montmartre*, 756 F.2d 1103, 1107 (5th Cir.1985). The *Cactus Pipe* court adopted the following statement made in *Grammenos v. Lemos*, 457 F.2d 1067, 1070 (2d Cir.1972), "If a party enters a case, makes no objection to jurisdiction, and asks the court to act on its behalf in some substantive way, it will be held to have waived further objection." *Cactus Pipe*, 756 F.2d at 1108. In *Rauch v. Day & Night Mfg. Corp.*, the court stated that a court can acquire jurisdiction over a nonresident only by actual service within the jurisdiction *"or by his waiver, by general appearance or otherwise, of the want of due service."* 576 F.2d 697, 700 (6th Cir.1978) (quoting *Goldey v. Morning News*, 156 U.S. 518, 521, 15 S.Ct. 559, 560, 39 L.Ed. 517 (1895)) (emphasis in original).

In the present case the plaintiffs filed suit only against the Attorney General of Texas. Although they sought a TRO against the defendant and "any person in active concert or participation with him," the only relief prayed was from enforcement actions "under the laws of the state of Texas." The complaint and motion for an injunction did not seek to enjoin the enforcement of any laws but those of Texas. The other thirty-three attorneys general joined the Attorney General of Texas in asking the district court to deny the injunction. At that time, they had neither been named defendants nor served with process. They stated that they filed the motion because they had been informed, presumably by the Attorney General of Texas, that the plaintiffs were seeking an

injunction that would interfere with the enforcement of their states' laws.

The record does not support this conclusion. The airlines' motion for a TRO referred to the actions of the NAAG in promulgating the guidelines, but sought relief only against Texas. Nevertheless, the attorneys general of thirty-three other states filed a motion asking the district court to deny the airlines' motion for a TRO against enforcement of Texas laws. Although they described themselves as "specially appearing," the attorneys general sought an affirmative act by the court that would benefit their states. The fact that they sought affirmative relief controls, not the form of their appearance, for the distinction between general and special appearances no longer exists in federal courts. A party may appear generally and yet object to personal jurisdiction at any time before the answer is filed or in the answer. *Grammenos*, 457 F.2d at 1070; Fed.R.Civ.P. 12(h). The thirty-three attorneys general were not parties, however, when they filed their motion. They had no basis for objecting to the court's jurisdiction as they had not been named defendants and no attempt had been made to bring them before the court by process.

It appears to us that the thirty-three attorneys general became *de facto* intervenors when the Attorney General of Kansas filed the motion, sought relief and participated in the TRO hearing on their behalf. At that point it was irrelevant that the thirty-three attorneys general had not been sued or served; they chose to take part in the pending action as if they were parties. True, they did not seek to intervene under Fed.R.Civ.P. 24. On the other hand, they did not appear as amici curiae. Without being required to do so, they came voluntarily into court and joined

with the Attorney General of Texas in seeking dismissal of the injunctive action. The arguments made by the Attorney General of Kansas on behalf of Texas and the other thirty-three states went to the heart of the issue before the district court. We believe the thirty-three attorneys general waived any objection to the jurisdiction of the court over their persons as representatives of their respective states. Thus, we affirm the order broadening the preliminary injunction to include the attorneys general of the thirty-three states and permitting the plaintiffs to amend their complaint to name and serve those attorneys general as additional defendants.

V.

In number 89-1610, the attorneys general of Texas and thirty-three other states appeal from the district court order that permitted the intervention of Pan Am as a plaintiff and broadened the scope of the preliminary injunction to include Pan Am. They argue that the complaint filed against Pan Am in state court by the Attorney General of Texas raised only state law issues and presented no federal question. As a result, the District Court for the Northern District of Texas lacked subject matter jurisdiction and erred in permitting removal, denying the Texas motion to remand to state court and transferring the case to the District Court for the Western District of Texas. They further assert that due to the lack of subject matter jurisdiction, the Western District erred in consolidating this action with that of *TWA v. Mattox*, granting Pan Am's motion to intervene as a plaintiff, and in broadening the preliminary injunction to include Pan Am.

Ordinarily, the existence of a federal question for removal purposes is determined according to the "well-pleaded complaint" rule. Under that rule, removal cannot be based on the existence of a federal defense. *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 63, 107 S.Ct. 1542, 1546, 95 L.Ed.2d 55 (1987). As the Court noted in *Taylor*, however, Congress may so completely preempt a particular area, that "any civil complaint raising this select group of claims is necessarily federal in character." *Id.* at 63-64, 107 S.Ct. at 1546-1547. It has long been recognized that section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, has such preemptive force. In *Taylor*, the Court found that ERISA's preemption provision is similarly so strong that every claim for benefits under a covered plan is regarded as arising under the laws of the United States. This determination was based on "the clearly manifested intent of Congress." *Id.* at 67, 107 S.Ct. at 1548.

An examination of the preemption language in § 1305(a)(1) and its legislative history leads to the conclusion that Congress did intend to preempt so completely the particular area of state laws "relating to rates, routes, or services" as to preclude state court actions. Congress preempted this area to maintain uniformity and to avoid the confusion and burdens that would result if interstate and international airlines were required to respond to standards of individual states. We agree with the First Circuit that Congress "did not intend to leave a vacuum to be filled by the Balkanizing forces of state and local regulation." *New England Legal Foundation*, 883 F.2d at 173. Congress made this clear by including the express preemption provision in the Deregulation Act. The legislative history of § 1305 exhibits a

congressional intent to treat a complaint raising "this select group of claims" as "necessarily federal in character." See *Taylor*, 481 U.S. at 63-64, 107 S.Ct. at 1546-1547. The complaint filed against Pan Am in state court by the Attorney General of Texas alleged that Pan Am had violated the Texas Deceptive Trade Practices Act through deceptive advertising of air fares. This claim relates to airline rates within the meaning of § 1305(a)(1) and is federal in character; therefore, we conclude that there is federal question jurisdiction.

In addition, we conclude that the Western District properly permitted Pan Am to intervene as a plaintiff pursuant to Fed.R.Civ.P. 24(b)(2). Pan Am's defense that the enforcement action of the Attorney General of Texas under the Texas Deceptive Trade Practices Act is preempted by §1305(a)(1) presents a question of law in common with that relied upon by the other plaintiff airlines in this case.

Finally, we find that the Western District properly broadened the scope of the preliminary injunction to include Pan Am. However, this injunction operates prospectively and specifically states that the action by the Attorney General of Texas against Pan Am is excepted from the injunction. Therefore, the preliminary injunction does not enjoin the Attorney General of Texas from prosecuting this suit against Pan Am, but it does enjoin him and the attorneys general of the other thirty-three states from bringing similar suits against the airline.

Conclusion

To summarize, we affirm the order of the district court in number 89-1142. The court issued a preliminary injunction that forbade the Attorney General of Texas and all other persons acting in concert with him from initiating any enforcement action under state law, which would seek to regulate the advertising of fares by plaintiffs TWA, Continental and British Air. The court later clarified this injunction by stating that it applied only to the Attorney General of Texas and to the laws of Texas.

In addition, we affirm the order of the district court in number 89-1509. Through this order, the court granted the motions of ten other airlines to intervene as plaintiffs. The court also granted plaintiffs TWA, Continental and British Air permission to amend their complaint and to add as defendants the attorneys general of thirty-three other states. And, the court broadened the preliminary injunction to include the attorneys general of the other thirty-three states. This broadened injunction operates prospectively and does not affect similar suits that had been filed by the Attorney General of Texas against Pan Am and the Attorneys General of California, Kansas and New York against TWA.

Finally, we affirm the order of the district court in number 89-1610. The court granted Pan Am's motion to intervene in number 89-1142 and broadened the preliminary injunction to include Pan Am among the airlines against whom the enjoined states could take no new action. The preliminary injunction operates prospectively and specifically states that the action by the Attorney General of Texas against Pan Am is excepted from the injunction. As a

result, the injunction does not enjoin the Attorney General of Texas from prosecuting this suit against Pan Am, but it does enjoin him and the attorneys general of the other thirty-three states from bringing similar suits against the airline.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS

AUSTIN DIVISION

TRANS WORLD AIRLINES, INC., CONTINENTAL AIRLINES, INC., and BRITISH AIRWAYS PLC, Plaintiffs,	§	
v.	§	CIVIL ACTION NO. A-89-CA-067
JIM MATTOX, Attorney General of the State of Texas, Defendant.	§	

ORDER

Pursuant to Rule 65(c) of the Federal Rules of Civil Procedure and after careful consideration of the Complaint, Plaintiffs' Motion for and Memorandum in Support of a Temporary Restraining Order, the opposition thereto, and the arguments of counsel, and after notice to and appearance in open Court by the Defendant, the Court finds that Plaintiffs will suffer immediate and irreparable injury if the Attorney General of the State of Texas or parties in concert or participating with him are permitted to bring an enforcement action against Plaintiffs, or any of them, pursuant to Tex. Bus. & Comm. Code §§17.41 et seq. or any other state law, in accordance with the Air Travel Industry Enforcement Guidelines ("Guidelines") adopted by the National Association of Attorneys General ("NAAG"), on account of Plaintiffs' air fare advertising and other

promotional and informational advertising. The Court finds that it is probable that: Plaintiffs will prevail in establishing their claims that any state regulation of advertising of the Plaintiffs' rates, routes, and services has been preempted by the Federal Government; subsection 2.5 of the NAAG Guidelines, which purportedly requires that "[a]ny fuel, tax, or other surcharge to a fare must be included in the total advertised price of the fare," conflicts with the Federal Government's regulatory scheme; and the threatened enforcement action by Attorney General Mattox and others in concert or participating with him would be in violation of the Supremacy Clause of the United States Constitution. The Court further finds it unnecessary to determine the probability that the Plaintiffs will demonstrate that the threatened implementation or enforcement of the NAAG Guidelines through state law, including enforcement of the Guidelines by Attorney General Mattox through Tex. Bus. & Comm. Code §§17.41 et seq., or others in concert or participating with him through their respective state statutes, constitutes an undue burden on interstate and foreign commerce in violation of the Commerce Clause; violates the Constitutional prohibition against interstate compacts that intrude into the federal domain (Art. 1, §10, cl. 3, U.S. Constitution); and violates Plaintiffs' First Amendment rights. In addition, the Court determines that granting the requested injunctive relief does not pose an untoward burden on Defendant and would, in fact, be in the public interest. Accordingly,

It is hereby ORDERED that Plaintiffs' Motion for Preliminary Injunction be and hereby is GRANTED.

It is further ORDERED that the Attorney

General of the State of Texas, Jim Mattox, individually and in his official capacity, and all other persons acting for the Attorney General in either capacity, and all other persons acting in concert or participation with Attorney General Mattox or on his behalf, and all other persons having actual knowledge of this Order, be and hereby are ENJOINED from:

> initiating any enforcement action pursuant to Tex. Bus. & Comm. Code §§17.41 et seq., or any other provision of state law, which would seek to regulate or restrict any aspect of the individually named plaintiff airlines' air fare advertising or the operations involving their rates, routes and/or services.

It is further ORDERED that Plaintiffs shall give security in the amount of $10,000.00 for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined, such bond to be approved by the Court or by the Clerk of the Court.

SIGNED this 30th day of January, 1989.

/s/ Walter S. Smith, Jr.
WALTER S. SMITH, JR.
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

TRANS WORLD AIRLINES, INC.,CONTINENTAL AIRLINES, INC., and BRITISH AIRWAYS PLC, Plaintiffs,	§	
v.	§	CIVIL ACTION
JIM MATTOX, Attorney General of the State of Texas, Defendant.	§	NO.A-89-CA-067

ORDER

Came on this date to be considered the motion of the Honorable Robert T. Stephan, Attorney General of the State of Kansas, to clarify and substitute this Court's Order granting a preliminary injunction in the above-styled and numbered case. The Court, having reviewed the motion, is of the opinion it is meritorious and should be granted. It is therefore,

ORDERED that the Motion to Clarify and Substitute filed by the Attorney General of the State of Kansas be and hereby is GRANTED. The Court's Order of January 30, 1989 does not apply to any Attorney General of any state, commonwealth, territory, or the District of Columbia, other than Jim Mattox, Attorney General of Texas, nor does that order apply to any other than the laws of the State of Texas.

SIGNED this 23rd day of February, 1989.

/s/ Walter S. Smith, Jr.
WALTER S. SMITH, JR.
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS

AUSTIN DIVISION

TRANS WORLD AIRLINES, INC., CONTINENTAL AIRLINES, INC., and BRITISH AIRWAYS PLC, Plaintiffs,	§	
v.	§	CIVIL ACTION NO. A-89-CA-067
JIM MATTOX, Attorney General of the State of Texas, Defendant.	§	

ORDER

Came on to be considered in the above-styled cause the Motion of Certain Air Carriers for Leave to Intervene and Plaintiffs' Motion to Broaden the Injunction issued by this Court. The Court, having reviewed both motions and the responses thereto, has determined that both motions are meritorious and should be granted.

This suit was originally filed by Plaintiffs Trans World Airlines, Inc., ("TWA"), Continental Airlines, Inc., ("Continental"), and British Airways PLC ("British Airways") against Jim Mattox, the Attorney General of the State of Texas. The Plaintiffs seek injunctive and declaratory relief, based upon the Attorney General's attempt to file suit against the airlines under the Texas deceptive trade practices act. The dispute centers around the advertising practices

of the airlines, which the Attorney General claims are violative of Texas law. The airlines claim this issue has been preempted by federal law.

The original injunction issued by this Court protected only the named Plaintiffs against actions brought by the Attorney General of Texas under Texas law which regulate or restrict air fare advertising or operations involving rates, routes and/or services.

Since the injunction was issued by this Court on January 30, 1989, the Attorneys General of California, Kansas and New York have filed suit against Plaintiff TWA on the same grounds--seeking to force the airline to comply with state advertising regulations. Attorney General Mattox has filed suit on identical grounds in the 101st District Court of Dallas County, Texas against Pan American World Airways, Inc. ("Pan Am"), which has also requested leave to intervene in the present action.

Attorney General Mattox, not satisfied with attempting to regulate domestic air carriers, has also threatened legal action against foreign air carriers, including Lufthansa German Airlines ("Lufthansa"). The letter from Attorney General Mattox which threatens enforcement against Lufthansa also purports to be sent on behalf of the States of California, Massachusetts, New York, and Washington. As a result of these threats, Lufthansa, along with Air Canada, Compagnie National Air France ("Air France"), Alitalia-Lines Aeree Italiane, S.P.A. ("Alitalia"), El Al Israel Airlines, Ltd., ("El Al"), Finnair, Japan Air Lines Company, Ltd., ("JAL"), Qantas Airways, Ltd., ("Qantas"), Scandinavian Airlines System ("SAS"), and Viacao Aerea Rio-Grandense ("Varig"), have requested leave to intervene.

In addition, the Plaintiffs to this action request

the Court to broaden its injunction to include the thirty-three states who have "specially appeared" in this action.

I. Motion to Intervene by Foreign Air Carriers

A. Intervention as a Right.

Rule 24(a) of the Federal Rules of Civil Procedure provides as follows:

> Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

It is undisputed that no statute confers an unlimited right to intervene in this action. As such, the parties must meet the requirements for intervention of right under 24(a)(2), which requires the following:

(1) the application for intervention must be timely;
(2) the applicant must have an interest relating to the property or transaction which is the subject of this action;
(3) the applicant must be so situated that the disposition of the action may, as a practical matter, impair or impede his ability to protect that interest;
(4) the applicant's interest must be inadequately represented by the existing parties to the suit.

New Orleans Public Service v. United Gas Pipe Line, 732 F.2d 452, 463 (5th Cir. 1984) (en banc), citing International Tank Terminals, Ltd. v. M/V Acadia Forest, 579 F.2d 964, 967 (5th Cir. 1978).

1. Timeliness

Timeliness of intervention is determined from a review of all the circumstances. NAACP v. New York, 413 U.S. 345 (1973). The Fifth Circuit has established four factors to be considered by the Court in determining the timeliness of a petition for leave to intervene:

> Factor 1. The length of time during which the would-be intervenor actually knew or reasonably should have known of his interest in the case before he petitioned for leave to intervene.
> Factor 2. The extent of the prejudice that the existing parties to the litigation may suffer as a result of the would-be intervenor's failure to apply for intervention as soon as he actually knew or reasonably should have known of his interest in the case.
> Factor 3. The extent of the prejudice that the would-be intervenor may suffer if his petition for leave to intervene is denied.
> Factor 4. The existence of unusual circumstances militating either for or against a determination that the application is timely.

Lelsz v. Kavanaugh, 710 F.2d 1040, 1043 (5th Cir. 1983).

In the present action, the petition for leave to intervene was filed only two months after the main suit was filed, and only three months after Lufthansa learned of the threatened legal action by Attorney General Mattox. Although not specifically outlined

in the Intervenor's response, the Court finds that there was no significant delay between the time the Intervenors knew or reasonably should have known of their interest in the suit and the time the petition for leave to intervene was actually filed. As such, the Intervenor's petition is timely.

Even if a two-to-three month delay is considered not timely, the existing parties will suffer no prejudice for failure of the Intervenors' to file their petition earlier. There are no existing suits filed against the Intervening parties, nor does their intervention in any way limit any existing rights of the Attorney General of the State of Texas. There is no evidence of any potential prejudice to the existing parties to the litigation.

On the other hand, the Intervenors will suffer great prejudice if not allowed to intervene. Attorney General Mattox has threatened suit against Lufthansa and could initiate suit against any of the other Intervenors at any time. The Intervenors are faced with great prejudice if not allowed to intervene.

Critical to this inquiry is adequacy of representation. See Lelsz v. Kavanaugh, 710 F.2d 1040 (5th Cir. 1983). "If the proposed intervenors' interests are adequately represented, then the prejudice from keeping them out will be slight." Id. at 1046. Here, the proposed intervenors' interests are not adequately represented. The proposed intervenors raise issues similar, but not identical to, those raised by the Plaintiffs. The laws related to foreign air carriers involve issues not pertinent to domestic air carriers.

As to Factor 4, there have been identified no unusual circumstances militating against a determination that the petition is timely. After a review of the facts as related to the above factors, the Court determines that the Intervenor's petition for Leave to Intervene was timely filed.

2. Interest

The Intervenor must demonstrate an "interest relating to the property or transaction which is the subject of the action." Rule 24(a)(2). An applicant for intervention need not be legally bound by the result of the main case, nor need his interest be identical to those claims asserted in the main action. New Orleans Public Service v. United Gas Pipe Line, 732 F.2d 452 (5th Cir. 1984) (en banc). However, intervention of right does require a "direct, substantial, legally protectable interest in the proceedings." Id. at 463.

The Intervenors have exhibited such an interest in the present proceedings. If not permitted to intervene, they will be exposed to suit on grounds prohibited by the injunction issued by this Court. Further, the claims presented by the foreign air carriers, although not identical to those presented by the Plaintiffs in this suit, are sufficiently similar to establish a direct and substantial interest in these proceedings.

3. Protection of Interest

This third factor requires the applicant to establish that the disposition of the main action may impair or impede his ability to protect his interest in the subject matter of the action, which is demonstrated by the possibility of suit being filed against the prospective intervenors if not brought under the protection of this Court's injunction.

4. Adequacy of Representation

Finally, as stated previously, the Court has determined that the existing parties to the suit will not adequately represent the interests of the proposed intervenors. The specific issue as to whether an action can be brought under state law to regulate the advertising practices of a foreign air carrier will not be presented absent grant of leave to intervene.

B. Permissive Intervention

Even if intervention as of right under 24(a) is not mandated, then permissive intervention should be granted under Rule 24(b). This Rule provides:

> Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common . . . . In exercising its discretion, the Court shall consider whether the intervention will unduly delay or prejudice the adjudication of the right of the original parties.

The proposed intervenors have established the existence of a question of law in common with those presented in the main action – specifically whether federal law preempts in the area of regulation of airline advertising. The main issue which prevents the intervenors' rights from being adequately represented by the Plaintiffs is the fact that the intervenors are foreign rather than domestic air carriers. Although federal law is substantially similar as it applies to both classes of air carriers, there are differences which will not be addressed absent intervention by the foreign air carriers.

In light of the preceding, the Motion of Certain Air Carriers for Leave to Intervene is **GRANTED**.

II. Motion to Broaden Injunction

The Plaintiffs seek to broaden the scope of the injunction issued by this Court on three grounds:

1) the evidence that other state attorneys general are acting "in concert" with Attorney General Mattox;
2) the attorneys general of thirty-three states have de facto intervened in this proceeding; and
3) the actions taken by various state attorneys general since this Court's preliminary injunction order threatens the Plaintiffs and this Court's jurisdiction.

Since this Court issued its preliminary injunction order, four additional suits have been filed against two air lines under other state laws in an attempt to regulate the airlines' advertising of their rates, routes and services:

1) Cause No. 89-2510-E, State of Texas v. Pan American World Airways, Inc., filed by Attorney General Mattox in the 101st District Court of Dallas County, Texas on February 28, 1989. This action was subsequently removed to Federal District Court in Dallas, Texas.
2) Cause No. 609941, People v. Trans World Airlines, Inc., filed by Attorney General John K. Van De Kamp in the Superior Court of San Diego, California on March 9, 1989.
3) Cause No. _____, People of the State of New York, ex rel Robert Abrams v. Trans World Airlines, Inc., filed by Attorney General Robert Abrams in the Supreme Court of the County of New York, State of New York on March 29, 1989.
4) Cause No. 89-CV-567, State of Kansas, ex rel Robert T. Stephan v. Trans World Airlines, Inc., filed by Attorney General Robert T. Stephan in the District Court of Shawnee County, Kansas, Division 2, on April 3, 1989.

In light of these developments and upon further consideration of the issues in this action, the Court has determined that the injunction presently in effect must be broadened in order to provide meaningful protection to the Plaintiff airlines. The suits initiated in other states on identical grounds and against the same parties demonstrate to the Court that this matter is not merely of local interest, but rather one that is of nationwide concern. Decisions made in the course of these proceedings

have the potential of effecting broad-sweeping changes in the airline industry.

The scope of this matter, clearly, is not limited to the activities of the Attorney General of Texas, but includes all Attorneys General involved in enforcing the Air Travel Industry Enforcement Guidelines ("Guidelines") adopted by the National Association of Attorneys General ("NAAG"). Therefore, the Court's injunction will be broadened to include not only Attorney General Mattox, but those State Attorneys General, acting in concert with Attorney General Mattox, or with each other, to enforce the NAAG guidelines through state law actions.

Failure to include these additional Defendants will seriously impair the ability of this Court to render a meaningful decision over the issue of whether federal law preempts state action in the matter of airline advertising. There is also a real possibility that the Plaintiff airlines will be subjected to a multiplicity of suits in various jurisdictions, thereby depriving this Court of the ability to offer any meaningful protection to the Plaintiffs. Despite the Plaintiffs' assertions that the additional Attorneys General be deemed intervenors, the Court has determined that the proper method of joinder is through Federal Rule of Civil Procedure 19.

Accordingly, it is **ORDERED** that Plaintiffs are hereby **GRANTED** leave to amend their complaint to include those Attorneys General who, acting in concert with Attorney General Mattox or among themselves, are attempting to use state law to enforce the NAAG guidelines relating to airline advertising within ten (10) days from the entry of this Order.

Prior to the addition of said Defendants as parties to this action, the Court's injunction will be broadened to include the following:

Hon. Grace Berg Schaible
Attorney General of Alaska

Hon. Robert K. Corbin
Attorney General of Arizona

Hon. Steve Clark
Attorney General of Arkansas

Hon. John Van De Kamp
Attorney General of California

Hon. Duane Woodward
Attorney General of Colorado

Hon. Clarine Nardi Riddle
Deputy Attorney General
(Acting Attorney General of Connecticut)

Hon. Robert Butterworth
Attorney General of Florida

Hon. Jim Jones
Attorney General of Idaho

Hon. Neil F. Hartigan
Attorney General of Illinois

Hon. Tom Miller
Attorney General of Iowa

Hon. Robert T. Stephan
Attorney General of Kansas

Hon. James E. Tierney
Attorney General of Maine

Hon. J. Joseph Curran, Jr.
Attorney General of Maryland

Hon. James M. Shannon
Attorney General of Massachusetts

Hon. Frank J. Kelley
Attorney General of Michigan

Hon. Hubert H. Humphrey, III
Attorney General of Minnesota

Hon. William L. Webster
Attorney General of Missouri

Hon. Robert M. Spire
Attorney General of Nebraska

Hon. Brian McKay
Attorney General of Nevada

Hon. Robert Abrams
Attorney General of New York

Hon. Lacy Thornberg
Attorney General of North Carolina

Hon. Nicholas Spaeth
Attorney General of North Dakota

Hon. Anthony J. Celebrezze, Jr.
Attorney General of Ohio

Hon. Robert Henry
Attorney General of Oklahoma

Hon. Dave Frohnmayer
Attorney General of Oregon

Hon. James E. O'Neil
Attorney General of Rhode Island

Hon. Roger Tellinghuisen
Attorney General of South Dakota

Hon. Charles W. Burson
Attorney General of Tennessee

Hon. Jeffrey Amestoy
Attorney General of Vermont

Hon. Kenneth O. Eikenberry
Attorney General of Washington

Hon. Charles G. Brown
Attorney General of West Virginia

Hon. Don J. Hanaway
Attorney General of Wisconsin

Hon. Joseph B. Meyer
Attorney General of Wyoming

The Court has determined that each of the above has an interest relating to the subject of this action and are so situated that the disposition of this action in their absence will leave those already parties subject to a substantial risk of incurring double, multiple or otherwise inconsistent obligations. Federal Rule of Civil Procedure 19(a)(2)(ii).

This injunction will operate prospectively only and will not act to interfere with the following proceedings:

1) Cause No. 89-2510-E, State of Texas v. Pan American World Airways, Inc., filed by Attorney General Mattox in the 101st District Court of Dallas County, Texas on February 28, 1989. This action was subsequently removed to Federal District Court in Dallas, Texas.

2) Cause No. 609941, People v. Trans World Airlines, Inc., filed by Attorney General John K. Van De Kamp in the Superior Court of San Diego, California on March 9, 1989.

3) Cause No. _____, People of the State of New York, ex rel Robert Abrams v. Trans World Airlines, Inc., filed by Attorney General Robert Abrams in the Supreme Court of the County of New York, State of New York on March 29, 1989.

4) Cause No. 89-CV-567, State of Kansas, ex rel Robert T. Stephan v. Trans World Airlines, Inc., filed by Attorney General Robert T. Stephan in the District Court of Shawnee County, Kansas, Division 2, on April 3, 1989.

The Court would hope that, considering the possibility of conflicting judgments in this case, these state court proceedings would be abated pending this Court's final determination of this matter.

IT IS SO ORDERED.

SIGNED this 26th day of April, 1989.

/s/ Walter S. Smith, Jr.
WALTER S. SMITH, JR.
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS

AUSTIN DIVISION

TRANS WORLD AIRLINES, INC., CONTINENTAL AIRLINES, INC., and BRITISH AIRWAYS PLC, Plaintiffs,	§	
v.	§	CIVIL ACTION NO. A-89-CA-067
JIM MATTOX, Attorney General of the State of Texas, et al. Defendant.	§	

ORDER

Came on this date to be considered the Motion of Pan American World Airways, Inc. ("Pan Am") for Leave to Intervene in the above-styled cause. The action pending against Pan Am in the United States District Court for the Northern District of Texas, Dallas Division, has been transferred to this Court and consolidated with the present action. The Court, therefore, has determined that the Motion to Intervene should be granted pursuant to Rule 24(b)(2), and that the protective order issued by this Court be broadened to include Pan Am.

IT IS SO ORDERED.

SIGNED this 26th day of May, 1989.

/s/ Walter S. Smith,Jr.
WALTER S. SMITH, JR.
UNITED STATES DISTRICT JUDGE

Supreme Court, U.S.
FILED
MAY 16 1991
OFFICE OF THE CLERK

Nos. 90-1604 and 90-1606

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

DAN MORALES, Attorney General of Texas, *et al.*,
Petitioners,

v.

TRANS WORLD AIRLINES, INC., *et al.*,
Respondents.

Petitions for Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether section 105(a) of the Airline Deregulation Act of 1978, which bars the states from imposing any regulation "relating to rates, routes, or services of any air carrier," preempts state regulation of air fare advertising.

2. Whether an effort by persons to intervene and secure relief in litigation before a district court constitutes sufficient contact with the forum to subject those persons to jurisdiction for purposes of that litigation.*

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*The respondents are Trans World Airlines, Inc.; Continental Airlines, Inc.; British Airways PLC; Pan American World Airways, Inc.; Air Canada; Campagnie Nationale Air France; Alitalia-Linee Aeree Italiane, S.p.A.; El Al Israel Airlines Ltd.; Finnair; Lufthansa German Airlines; Japan Air Lines Company, Ltd.; Qantas Airways Ltd.; Scandinavian Airlines System; and Viacao Aerea Rio-Grandense (VARIG). Their corporate parents and partially owned subsidiaries are listed in App. A-N, *infra*.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

Nos. 90-1604 and 90-1606

DAN MORALES, Attorney General of Texas, *et al.*,
Petitioners,

v.

TRANS WORLD AIRLINES, INC., *et al.*,
Respondents.

Petitions for Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF IN OPPOSITION

This brief in opposition is filed on behalf of all respondents.

STATEMENT

1. *The federal regulatory scheme.* Civil aviation has been subject to extensive federal regulation since enactment of the Civil Aeronautics Act of 1938, ch. 601, 52 Stat. 973 (1938). Included among the powers conferred upon the Civil Aeronautics Board ("CAB") by that Act was the authority, now codified in section 411(a) of the Federal Aviation Act, 49 U.S.C. app. § 1381(a), to determine whether an air carrier "has been or is engaged in unfair or deceptive practices or unfair methods of competition." For many years that authority over consumer protection was shared with the states. *See Nader v. Allegheny Airlines*, 426 U.S. 290 (1976). But subsequent enactment of the Airline Deregulation Act of 1978, Pub.

L. No. 95-504, 92 Stat. 1705 (1978), represented "a major change and fundamental redirection as to the manner of regulation of interstate and overseas air transportation." S. Rep. No. 631, 95th Cong., 2d Sess. 52 (1978). *See also* H.R. Conf. Rep. 1779, 95th Cong., 2d Sess. 56 (1978) ("this new, comprehensive legislation . . . entirely overhauls the aviation regulatory system").

The purpose of the Deregulation Act was to encourage development of a system of civil aviation that "relies on competitive market forces to determine the quality, variety, and price of air services . . . ." S. Rep. No. 631 at 1; *see also* 49 U.S.C. app. § 1302(a)(9). Section 102(a)(7) of the Act, 49 U.S.C. app. § 1302(a)(7), instructs the CAB to prevent "unfair, deceptive, predatory, or anticompetitive practices . . . that would tend to allow one or more air carriers . . . unreasonably to increase prices, reduce services or exclude competition in air transportation." In turn, section 105(a)(1) of the Act expressly preempts state law: "no State . . . shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier." Congress thus chose to eliminate "a confusing system of dual regulation," because "it is important that only one standard of regulation be provided for airlines operating under the authority of the CAB." S. Rep. No. 631 at 98. *See also* H.R. Rep. No. 1211, 95th Cong., 2d Sess. 15-16 (1978).

The Deregulation Act was followed by the Civil Aeronautics Board Sunset Act of 1984, Pub. L. No. 98-443, 98 Stat. 1704 (1984), which transferred the powers and duties of the CAB to the Department of Transportation ("DOT"). This Act preserved section 105(a)(1) of the Deregulation Act, with its express statement of federal preemption, and the accompanying House Report explained that preemption was of particular importance in the area of consumer protection:

> In addition to protecting consumers, federal regulation insures a uniform system of regulation and preempts regulation by the states. If there was no Federal regulation the states might begin to regulate these areas, and the regulations could vary from state to state. This would be confusing and burdensome to airlines passengers, as well as to the airlines.

H.R. Rep. No. 793, 98th Cong., 2d Sess. 4 (1984). The Report further explained that Congress had chosen to consolidate "CAB's consumer protection and unfair competitive practice authorities" in DOT in order to avoid the conflict or confusion that might result "[i]f two agencies shared authority." *Id.* at 6.

Following enactment of the Sunset Act DOT has continued and expanded upon CAB's regulations in the area of consumer protection. DOT's regulations comprehensively address such matters as advertising; competitive, promotional, and deceptive practices; sales; and notice of terms of contract of carriage. *See generally* 14 C.F.R. §§ 201, 221, 254, 380, 399 (1990). With specific reference to the advertising of air fares, DOT has issued orders providing, for example, that the international departure tax, customs and immigration fees, and surcharges for security services may be identified separately from the base fare. DOT Orders 85-12-68 and 89-4-25. 4 R. Ex. 5 ("R" refers to the multi-volume record on appeal); Appellees Br. at A33-35 (No. 89-1142 5th Cir.). Moreover, in publishing notice of proposed regulations, DOT has affirmed that section 105(a)(1) of the Deregulation Act protects carriers against potentially conflicting regulation of air fare advertising by the 50 states and dictates "that there be one industry-wide price advertisement standard." 54 Fed. Reg. 31052, 31054 (1989).

2. *The events leading to this litigation.* In September 1987, the National Association of Attorneys General ("NAAG") circulated proposed Air Travel Industry En-

forcement Guidelines, including proposed uniform state rules governing air fare advertising, to carriers, DOT, and the Federal Trade Commission ("FTC") for comment. The Guidelines provided, *inter alia*, "that any fuel, tax or other surcharge to air fare must be included in the total advertised price of the fare." Texas Pet. App. 15a ("Texas Pet." refers to the petition in No. 90-1604).

The FTC and DOT both strongly opposed adoption of the Guidelines. The FTC pointed out that the Guidelines, "especially the advertising provisions, could have the unintended consequence of substantially inhibiting effective price competition," that they "might result in inconsistent federal and state regulation," and that they "ignor[e] the important question of federal preemption." 4 R. Ex. 2. DOT also objected to the Guidelines on their merits and commented further that they "appear to be preempted by the Federal Aviation Act (49 U.S.C. § 1301 *et seq.*) or [DOT] rules or would unduly burden interstate commerce . . . ." 4 R. Ex. 8 at 1. Notwithstanding this federal opposition, NAAG adopted the Guidelines in December 1987. Texas Pet. App. 15a, 37a.

In February 1988, the attorneys general of Texas and six other states circulated a memorandum announcing that they intended to "bring airline advertisements into compliance with standards delineated in the [NAAG] guidelines for fare advertising." 2 R. Ex. H, Attachment A. DOT responded by stating that "we have specifically permitted the type of advertising to which the Attorneys General object" and repeating that "the federal government has preempted this aspect of state price advertising regulation." 4 R. Ex. 9 at 1. Undeterred, the attorneys general of Texas and four other states sent letters in November 1988 to respondents Trans World Airlines, Inc. ("TWA"), Continental Airlines, Inc. ("Continental"), and British Airways PLC ("British Air"), "notifying them that some of their advertisements violated the NAAG guidelines and these states' false advertising and

deceptive practices laws . . . [and] charg[ing] that the airlines had attempted to make their fares appear lower than those of their competitors by prominently advertising the ticket price, while less prominently disclosing taxes, surcharges and fees." Texas Pet. App. 15a. "The letter threatened prosecution." *Id.*

3. *Litigation in the district court.* Faced with this threat, TWA, Continental, and British Air brought suit against the Attorney General of Texas in the United States District Court for the Western District of Texas, seeking to enjoin him from enforcing the Texas Deceptive Trade Practices Act against their fare advertising. They moved for a temporary restraining order ("TRO") and the court held a hearing on the motion. On the day of the hearing, the attorneys general of 33 states (not including Texas) filed a motion requesting an order denying a TRO or, in the alternative, a postponement of hearing. *Id.* at 38a. The Attorney General of Kansas participated in the hearing, explaining that he appeared on behalf of all the attorneys general who had filed that motion. *Id.* at 38a-39a.

Following the hearing, the district court determined that the plaintiffs had established a likelihood of success on the merits and also had satisfied the other requirements for preliminary injunctive relief. *Id.* at 48a-49a. Accordingly, the court "issued the preliminary injunction prohibiting the Attorney General of Texas from initiating any enforcement action to regulate the [plaintiffs'] advertising of fares." *Id.* at 39a. The Attorney General of Kansas then filed a motion to clarify the injunctive order. *Id.* The court granted the motion, making explicit that the preliminary injunction "does not apply to any Attorney General of any state, commonwealth, territory, or the District of Columbia, other than Jim Mattox, Attorney General of Texas, nor does that order apply to any law other than the laws of the State of Texas." *Id.*

Subsequently, TWA, Continental, and British Air moved to broaden the preliminary injunction to cover the 33 attorneys general who had intervened *de facto* as defendants in order to oppose the request for a TRO, and ten additional respondent airlines here moved for leave to intervene as plaintiffs. The district court granted both motions on April 26, 1989. *Id.* at 52a-64a. On May 26, 1989, the court permitted the remaining respondent airline here, Pan American World Airways, Inc., also to intervene as a plaintiff. *Id.* at 65a.

All 34 attorneys general appealed from issuance of the preliminary injunction.

4. *The Fifth Circuit's opinion.* The court of appeals affirmed, agreeing that "state laws pertaining to deceptive advertising have been expressly preempted by federal law when applied to fare advertising by interstate and international airlines." *Id.* at 23a.

The court began by noting that section 105(a)(1) of the Deregulation Act preempts all state laws "relating to rates, routes, or services," and that this Court has held that a state law "relates to" a subject, as that term is used in a preemption statute, if it "has a connection with or reference to" the subject. *Id.* at 26a (citing *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96-98 (1983)). The court further noted that the Seventh Circuit earlier had concluded that "[p]ricing advertising surely 'relates to' price" and that other courts had reached similar conclusions concerning the reach of section 105(a)(1). *Id.* at 26a-28a (citing *Illinois Corporate Travel, Inc. v. American Airlines, Inc.*, 889 F.2d 751, 754 (7th Cir. 1989), *cert. denied*, 110 S. Ct. 1948 (1990); *New England Legal Found. v. Massachusetts Port Auth.*, 883 F.2d 157 (1st Cir. 1989); *O'Carroll v. American Airlines, Inc.*, 863 F.2d 11 (5th Cir.), *cert. denied*, 490 U.S. 1106 (1989); *Anderson v. USAir, Inc.*, 818 F.2d 49 (D.C. Cir. 1987); and *Hingson v. Pacific Southwest Airlines*, 743 F.2d 1408 (9th Cir. 1984)).

The court then reviewed the legislative history of section 105(a)(1) and determined that it "demonstrates the intent of Congress to expressly prempt state regulation of airline fare advertising, leaving no right of action that arises under state law only." *Id.* at 31a. In addition, "[s]ubsequent legislation has confirmed the intent of Congress to preempt state regulation of airline fare advertising." *Id.* at 32a. The court concluded:

> Given the history of congressional concern and the inclusion of specific preemption language in the Deregulation Act, we agree with the Seventh Circuit in *Illinois Corporate Travel* that airline fare advertising "relates to" rates within the meaning of § 1305(a)(1). Although the state laws against deceptive advertising are not aimed specifically at airlines, and clearly do not attempt to set rates, the conclusion is inescapable that such laws do "relate to" rates when applied to airline fare advertising. As the Supreme Court noted in *Shaw*, a law relates to a particular subject "if it has a connection with or reference to" that subject. It cannot be gainsaid that enforcement of a state law regulating fare advertising by airlines has a connection with or reference to rates within the meaning of § 1305(a)(1). Therefore, such state action is expressly preempted by § 1305(a)(1).

Id. at 32a-33a (citations omitted). Consequently, "the airlines have demonstrated a substantial likelihood of success on their claim for a permanent injunction." *Id.* at 34a. The court determined that the other requirements for issuance of a preliminary injunction also had been satisfied. *Id.* at 35a-36a.

The court further held that "the thirty-three attorneys general became *de facto* intervenors when the Attorney General of Kansas filed the motion, sought relief and participated in the TRO hearing on their behalf . . . [and thus] waived any objection to the jurisdiction of the court

over their persons as representatives of their respective states." *Id.* at 42a-43a.

The Attorney General of Texas and 33 other state attorneys general filed petitions for writs of certiorari, which this Court denied on October 15, 1990. 111 S. Ct. 307, 308 (1990).

5. *Entry of final judgment and the second appeal.* After the Fifth Circuit affirmed the award of preliminary relief, the district court granted summary judgment for the respondent airlines, issued a permanent injunction, and entered final judgment. *Id.* at 8a-12a. The "permanent injunction . . . is virtually identical to the preliminary injunction that the court of appeals affirmed in its prior order." Texas Pet. 2.

The Fifth Circuit, relying upon its earlier opinion, affirmed in an unpublished *per curiam* order. In response to petitioners' complaint that summary judgment was improper—the only new issue raised on the second appeal—the court concluded:

> Defendants have failed to point out any outstanding factual issue relevant to the judgment. The question of preemption, the cornerstone of the case, is a question of law which the district court could clearly resolve on the basis of the summary judgment evidence available.

Texas Pet. App. 6a-7a.

ARGUMENT

The Fifth Circuit's unpublished *per curiam* order rests squarely on its earlier opinion in this case. In seeking review of this order, petitioners do no more than rehash the arguments made in their own earlier petitions, without offering anything new. This second round of petitions also should be denied. The Fifth Circuit's rulings are manifestly correct and do not warrant review. There is no conflict among the circuits or any other reason why this Court should hear this case.

1. *Section 105(a)(1) of the Deregulation Act preempts state regulation of air fare advertising.*

a. Section 105(a)(1) preempts all state laws "relating to rates, routes, or services of any air carrier." The phrase "relating to," as used in federal preemption statutes, must be given a "broad common-sense meaning." *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 47 (1987). Indeed, the phrase "relates to" is "conspicuous for its breadth." *FMC Corp. v. Holliday*, 111 S. Ct. 403, 407 (1990). Congress' intent in using such "deliberately expansive" language is underscored where the statute uses equally broad language in defining preempted state law to include "all laws, decisions, rules, regulations, or other State action having the effect of law," as section 105(a)(1) of the Deregulation Act does here. *See Ingersoll-Rand Co. v. McClendon*, 111 S. Ct. 478, 482-83 (1990).

A state law "relates to" a subject "if it has a connection with or reference to" that subject. *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 96-97 (1983). *See also, e.g., Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 739 (1985); *Blue Cross & Blue Shield of Florida, Inc. v. Department of Banking and Finance*, 791 F.2d 1501, 1504-05 (11th Cir. 1986); *Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (3d Cir. 1984). As both the Fifth and Seventh Circuits agree, state laws regulating the advertising of air fares plainly have a connection with

or reference to rates and thus are preempted by section 105(a)(1). *See Illinois Corporate Travel, Inc. v. American Airlines, Inc.*, 889 F.2d 751, 754 (7th Cir. 1989), *cert. denied*, 110 S. Ct. 1948 (1990).

The legislative history confirms this conclusion. Prior to 1978, the CAB and the states had shared responsibility over consumer protection. *See Nader*, 426 U.S. at 300-01. The enactment during that year of section 105(a)(1) was intended, among other things, to eliminate this "confusing system of dual regulation," S. Rep. No. 631 at 98, and to "prevent conflicts and inconsistent regulations." H.R. Rep. No. 1211 at 16. "Congress obviously did not intend to leave a vacuum to be filled by the Balkanizing forces of state and local regulation." *New England Legal Found. v. Massachusetts Port Auth.*, 883 F.2d 157, 173 (1st Cir. 1989).

When Congress later transferred the CAB's powers over consumer protection to DOT, it explained that "[i]n addition to protecting consumers, federal regulation insures a uniform system of regulation and preempts regulation by the states," thereby leaving air carriers free from "confusing and burdensome" state regulation. H.R. Rep. No. 793 at 4. This view of a subsequent Congress concerning the meaning of a previously enacted statute has "significant weight," *Seatrain Shipbuilding Corp. v. Shell Oil Co.*, 444 U.S. 572, 596 (1980), especially where, as here, "Congress is not merely expressing an opinion on a matter which may come before a court but is acting on what it understands its own prior acts to mean." *Mount Sinai Hosp. v. Weinberger*, 517 F.2d 329, 343 (5th Cir. 1975).

DOT repeatedly has taken the position that its authority over consumer protection preempts state laws of the kind that petitioners are seeking to enforce. To the extent that those state laws are fairly represented by the NAAG Guidelines, they are directly contrary to the position that DOT has announced concerning the separate

identification of taxes, fees, and surcharges in fare advertisements. *See* pp. 3-4, *supra*. For all these reasons, the Fifth Circuit correctly concluded that section 105(a)(1) preempts state efforts at regulating air fare advertising.

b. The decision below does not conflict with the decisions either of this Court or of the other courts of appeals. Although petitioners attempt to suggest otherwise, the decision below obviously is consistent with *Nader*. In that case, this Court held that the CAB's authority to regulate consumer protection under section 411(a) of the Federal Aviation Act was not exclusive in the absence of any provision in that Act expressly preempting state law. The decision in this case turns on section 105(a)(1) of the Deregulation Act, which was enacted two years *after* the decision in *Nader* and does expressly preempt state law. The Deregulation Act, with its express preemption of state law, fundamentally redirected and entirely overhauled the regulatory scheme under which *Nader* had been decided. This case and *Nader* thus involve different issues arising under different statutes with different regulatory objectives.

The decision below also is consistent with *Alaska v. Department of Transp.*, 868 F.2d 441 (D.C. Cir. 1989), *Air Transport Ass'n v. Public Util. Comm'n*, 833 F.2d 200 (9th Cir. 1987), *cert. denied*, 487 U.S. 1236 (1988), and *West v. Northwest Airlines, Inc.*, 923 F.2d 657 (9th Cir. 1990), the three federal appellate decisions on which petitioners rely in asserting a conflict. The decision in *Alaska* did not involve section 105(a)(1) and, indeed, had nothing whatsoever to do with preemption; the question there concerned only the procedural validity of certain administrative orders. Preemption was at issue in *Air Transport*; the court held that a state regulation forbidding surreptitious eavesdropping on telephone conversations was unrelated to airline rates, routes, or services and therefore was not preempted by section 105(a)(1).

That regulation obviously was far removed from the regulation of air fare advertising at issue in this case. In *West*, which was decided subsequent to the first opinion by the Fifth Circuit in this case, the Ninth Circuit held that a passenger may sue an air carrier under state law for damages resulting from overbooking, reasoning that section 105(a)(1) does not "encompass all state laws that affect airline services, however tangentially." As the Attorney General of Texas concedes, "[t]he Ninth Circuit does not discuss the Fifth's Circuit opinion," and its holding "did not directly involve airline advertising." Texas Pet. 15. The Ninth Circuit has not decided a case involving state regulation of air fare advertising, nor has it said anything to indicate that it disagrees with the decisions of the Fifth and Seventh Circuits on this issue.

The Attorney General of Texas wrongly argues that "[t]he effect of the injunction is to prohibit the filing of any additional lawsuits by any state, whether in state or federal court." Texas Pet. 7 n.6. As the other petitioners conceded in their earlier petition, "[s]ixteen states are not covered by the injunction . . . [and] [n]umerous airlines are not parties to th[is] litigation and are not covered by the injunction." Petition of Thirty-three State Attorneys General in No. 90-232 at 31. There is, thus, ample opportunity for further consideration of the question of preemption in the lower courts.

There is little reason to fear, however, that the lower courts will be overburdened by a groundswell of litigation involving this question. Petitioners concede that only a handful of pending cases, if any, present this issue, and all are in state trial courts. *See* Tex. Pet. 7 n.6. "Wise adjudication has its own time for ripening." *Maryland v. Baltimore Radio Show, Inc.*, 338 U.S. 912, 918 (1950) (opinion of Frankfurter, J., respecting denial of certiorari). The issue here plainly is not ripe for review by this Court.

2. *The district court properly exercised jurisdiction over the non-Texas petitioners.* The non-Texas petitioners argue that the Fifth Circuit's determination that they were *de facto* intervenors is not supported by the *facts*, 31 Pet. 17-23 ("31 Pet." refers to the petition in No. 90-1606), and that, again as a factual matter, there was no case or controversy. *Id.* at 23-30. These fact-specific contentions do not warrant review by this Court.

a. The attorneys general entered this litigation voluntarily and of their own accord. They were under no compulsion to do so:

> the plaintiffs filed suit only against the Attorney General of Texas. Although they sought a TRO against the defendant and "any person in active concert or participation with him," the only relief prayed was from enforcement actions "under the laws of the state of Texas." The complaint and motion for an injunction did not seek to enjoin the enforcement of any laws but those of Texas.

Texas Pet. App. 41a. Nonetheless, the non-Texas petitioners, behaving like named parties, rushed into court filing a motion, seeking relief, and participating in argument. Because they were present and active in court, their contact with the forum was even more substantial than that of the defendant in *Burnham v. Superior Court of California*, 110 S. Ct. 2105 (1990) (upholding assertion of jurisdiction over individual out-of-state defendant served while visiting within state).

Although the non-Texas petitioners did not expressly waive objections to personal jurisdiction, neither did they expressly assert such objections. They claim now that they "contested" jurisdiction, but that is wrong; they simply sought relief "without admitting that this Court has personal jurisdiction over them." Texas Pet. App. 38a. They were precluded from contesting jurisdiction, for they were "ask[ing] the court to act on [their] behalf in some substantive way." 31 Pet. 20 n.16.

In these circumstances, there was ample factual basis for the Fifth Circuit's determination that the non-Texas petitioners intervened *de facto* and thus subjected themselves to the personal jurisdiction of the district court. *See, e.g., In re Grand Jury Proceedings*, 654 F.2d 268, 271 (3d Cir.), *cert. denied*, 454 U.S. 1098 (1981); *Martindell v. International Tel. & Tel. Corp.*, 594 F.2d 291, 294 (2d Cir. 1979); *Adams v. Morton*, 581 F.2d 1314, 1318 (9th Cir. 1978), *cert. denied*, 440 U.S. 958 (1979). This essentially factual question is *sui generis* and does not warrant further review.

b. The non-Texas petitioners' related claim, that there was no justiciable case or controversy, is insubstantial. It is undisputed that respondents' advertising violates the NAAG Guidelines, which the attorneys general treat as expressive of state law. In this context, the non-Texas petitioners' precipitate entry into the case, with their demand that they be left free to "enforce[] . . . their state law in their state court," Texas Pet. App. 39a, adequately demonstrated the existence of a "real, substantial controversy between parties having adverse legal interests, a dispute definite and concrete, not hypothetical or abstract." *Railway Mail Ass'n v. Corsi*, 326 U.S. 88, 93 (1945). Respondents were not "without some reason in fearing prosecution," *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 302 (1979), and did not have to "await the consummation of threatened injury to obtain preventive relief." *Pennsylvania v. West Virginia*, 262 U.S. 553, 593 (1923).

CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted,

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APPENDICES

APPENDIX A

TRANS WORLD AIRLINES, INC.

Parent Company

TWA Airlines, Inc.

Subsidiaries (Except Wholly Owned Subsidiaries)

Airline Data Resources, Inc.
Airport Cargo Services, Inc.
Airport Terminal Services, Inc.
Ambassador Fuel Corporation
Ambassador Health Systems, Inc.
Blue Jay Investors Plan, Inc.
Century Air, Rail and Land Insurance Co.
Elsinore Investment Services, Inc.
Elytron, Inc.
International Aviation Security, Inc.
Mega Advertising, Inc.
Midcoast Aviation, Inc.
Midcoast-Little Rock, Inc.
Northwest 112th Street Corp.
Ozark Group, Inc.
Storm Haven, Inc.
Swan Management Corp.
The Gateway Group (U.K.), Inc.
The Travel Channel, Inc.
The TWA Ambassadors Club, Inc.
Transcontinental & Western Air, Inc.
Trans World Airlines (Australia) Pty. Ltd.
Trans World Airlines Services, Inc.
Trans World Computer Services, Inc.
Trans World Pars, Inc.
TWA America, Inc.
TWA Aviation, Inc.
TWA de Mexico, S.A., de C.V.
TWA Employee Services, Inc.

TWA Getaway Vacations, Inc.
TWA Group, Inc.
TWA International, Inc.
TWA Investment Plan, Inc.
TWA Maintenance Services, Inc.
TWA Management Services, Inc.
TWA Nippon, Inc.
TWA Standards & Controls, Inc.
TWA-U.S., Inc.
World Marketing Services, Inc.

APPENDIX B

CONTINENTAL AIRLINES, INC.

Parent Company

Continental Airlines Holdings, Inc.

Subsidiaries (Except Wholly Owned Subsidiaries)

Bar Harbor Airways, Inc.
Continental—Eastern Sales, Inc.
TAC/SAS Quality Service Institute, Inc.

APPENDIX C

BRITISH AIRWAYS PLC

PARENT COMPANY

None

*Subsidiaries**

Air Mauritius Ltd.
ALTA Holidays Ltd.
Anchorage Fueling and Servicing Company
Bedford Associates, Inc.
Britair Acquisition Corp.
British Air Holidays Ltd.
British Airways Associated Companies, Ltd.
British Airways Engine Overhaul Ltd.
British Airways Enterprises Ltd.
British Airways Tour Operations
British Caledonian Flight Training
British Caledonian Group PLC
Caledonian Airways Limited
Covia Partnership
Distribution Systems Inc.
Hogg Robinson PLC
Penta Hotels NV
Overseas Air Travel Ltd.
Ruby Aircraft Leasing and Trading
Sabena World Airlines NV
Sapphire Aircraft Leasing and Trading
Speedbird Insurance Company Ltd.
The Galileo Company Limited
The Plimsoll Line Ltd.
Travel Automation Services Ltd.

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* Does not include companies with less than 5% British Airways PLC Ownership.

APPENDIX D

PAN AMERICAN WORLD AIRWAYS, INC.

Parent Company

Pan Am Corporation

Subsidiaries (Except Wholly Owned Subsidiaries)

Aeronautical Radio, Inc.
Air Cargo, Inc.
Airline Tariff Publishing Company
Escola Americana de Rio de Janeiro
Honolulu Fueling Facilities Corporation
International Aeradio (Caribbean) Ltd.
Liberian Development Corporation
Manhattan Air Terminal, Inc.
Nigerian Aviation Handling Co.
Promotora de Hoteles de Turismo Medellin, S.A.
Social Immobiliara Norteamericana, S.A.
Société International de Telecommunications Aeronautiques

APPENDIX E

AIR CANADA

Parent Company

None

Subsidiaries (Except Wholly Owned Subsidiaries)

Air B.C. Limited
Express Messenger Systems Inc.
Maple Leaf Holdings Inc.
Northern Express Messenger Systems Ltd.
152160 Canada Inc.

APPENDIX F

COMPAGNIE NATIONALE AIR FRANCE

Parent Company

None

Subsidiaries (Except Wholly Owned Subsidiaries)

Air Charter
Air Inter
Euroberlin France
Saresco (Société Aéroportuaire de Restauration, de Services et de Commerces)
Servair (Compagnie d'Exploitation des Services Auxiliaries Aériens)
Société Immobilière Aéroportuaire
Sodexi
Sotair (Société de Tourisme Aérien International)
UTA French Airlines

APPENDIX G

ALITALIA-LINEE AEREE ITALIANE, S.p.A.

Parent Company

Istituto per la Ricostruzione Industriale (IRI)

Subsidiaries (Except Wholly Owned Subsidiaries)

Aeroporti di Roma—Societa per la Gestione del Sistema Aeroportuale della Capitale S.p.A.
Alidata S.p.A.
Eurofly S.p.A.
Italiatour S.p.A.
Racom Teledata S.p.A.
Sigma—Societa Italiana Gestione Sistema Multi Accesso per Azioni
Sigma Travel System S.p.A.
Sisam S.p.A.

APPENDIX H

EL AL ISRAEL AIRLINES LTD.

Parent Company

None

Subsidiaries (Except Wholly Owned Subsidiaries)

None

APPENDIX I

FINNAIR

Parent Company

None

Subsidiaries (Except Wholly Owned Subsidiaries)

Airplus Company Ltd.
Asunto Oy Heikkiläntalo
Asunto Oy Iso-Roobertinkatu 3-5-7
Asunto Oy Mannerheimintie 100
Asunto Oy Metsätorppa, Kauppalantie 48
Asunto Oy Octavus, Mannerheimintie 84
Asunto Oy Tenholantie 4
Finlandia Travel Agency Ltd.
Finnaviation Oy
Finnish American International Trade Inc.
Finnland Haus GmbH
Infa-Hotel
Kar-Air Ab
Karair Oy
Matkatoimisto Matkayhtyma Oy
Oy TEN-MAR Fastighets Ab
SAS International Hotels A/S
Suomen Matkatoimisto Oy

APPENDIX J

LUFTHANSA GERMAN AIRLINES
(Deutsche Lufthansa Aktiengesellschaft)

Parent Company

None

Subsidiaries (Except Wholly Owned Subsidiaries)

DLT Deutsche Luftverkehrsgesellschaft mbH

APPENDIX K

JAPAN AIRLINES COMPANY, LTD.

Parent Company

None

Subsidiaries (Except Wholly Owned Subsidiaries)

Avionet (USA) Inc.
Global Laundry & Linen Supply, Inc.
Hotel Nikko Saipan, Inc.
International Inflight Catering Company
JAL International Service, Inc.
JAL Leasing (USA) Inc.
Japan Airlines Management Corp.
Lanovac, Inc.
Nikko Inflight Catering Company
Pacific Fuel Trading Corp.

APPENDIX L

QANTAS AIRWAYS LTD.

Parent Company

None

Subsidiaries (Except Wholly Owned Subsidiaries)

Aeronautical Radio Thailand Limited
Air Pacific Limited
Fiji Resorts Limited
Gateway Passenger Services, Inc.
Global Logistics Services Pty. Limited
Honolulu Fueling Facilities Corporation Inc.
Jupiter Air (Australia) Pty. Limited
Laxfuel Corporation
Los Angeles West Terminal Fuel Corporation
Official Filing Company
QHF Insurance Brokers Limited
Société Internationale de Telecommunications Aeronautiques
Thomas Cook Pty. Limited
Tradegate Australia Limited
Travel Industries Automated Systems Pty. Ltd.

APPENDIX M

SCANDINAVIAN AIRLINES SYSTEM (SAS)*

Parent Company

None

Subsidiaries (Except Wholly Owned Subsidiaries)

A. Giele & Sohne (GmbH & Co.)
Airlines of Britain Holdings PLC
Amadeus A.G.
Amadeus Global Travel Distribution S.A.
Aviation Holdings PLC
Bennett Rejsebereu
Bromma Tryck AB
Continental Airlines Holdings, Inc.
Copenhagen Airline Catering A/S
Copenhagen Duty-Free Distribution A/S
Copenhagen International Hotels K/S GH
CSG Catering Service GmbH & Co.
Diners Club Danmark A/S
Diners Club Finland OY
Diners Club Nordic A/S
Diners Club Norge A/S
Diners Club Sweden AB
Gronlandsfly A/S
Hotel Scandinavia K/S
Hoteles Sunwing SA
Hoteles Vacatio SA
Inflight Services International Ltd.
Inversas Ltda.

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* The SAS Group is made up the SAS Consortium and its subsidiaries and affiliated companies. The SAS Consortium was formed by the three national airlines of Denmark, Norway, and Sweden: Det Danske Luftfartseiskab A/S (DDL), Det Norske Luftfartseiskap A/S (DNL), and AB Aerotransport (ABA), respectively. The subsidiaries listed in this appendix are the subsidiaries and affiliated companies of SAS.

Kobenhavns Lufthavns Forretningscenter K/S
Lan Chile S.A.
Nord-Norsk Hotelldrift A/S
Norwegian Showcase (USA) A/S
Oslo Airline Catering A/S
Polygon Insurance Co. Ltd.
Saga Solreiser A/S
Saison Overseas (Holdings) BV
SAS Capital BV
SAS Globetrotten Hotel S/S
SAS Grand Hotel Beijing, Joint Venture Co. Ltd.
SAS Holding A/S
SAS Hotels A/S Danmark
SAS Hotels Brussels S.A.
SAS Hotels (Deutschland) GmbH
SAS Hotels N.V.
SAS Hotels U.K., Ltd.
SAS International Hotels A/S
SAS Leisure AB
SAS Park Avenue Hotel AB
SAS Park Royal Hotel A/S
SAS Scandinavia Hotel A/S
SAS Service Partner, AB, Sverige
SAS Service Partner A/S
SAS Service Partner A/S, Norge
SAS Service Partner GmbH & Co.
SAS Service Partner Holding GmbH Deutschland
SAS Service Partner Holdings Ltd.
SAS Service Partner Ltd.
SAS Service Partner Offshore & Industrial Catering A/S
SAS Service Partner Offshore Catering Stavanger A/S
SAS Trading Holding A/S
Scandinavia Aero Engine Services AB
Scandinavian Aviation Investments Ltd.
Scandinavian Multi Access Systems AB
Smart Sverigt AB
Spanair S.A.
Stockholm Airline Catering AB

Stockholm Airport Restaurants AB
Sunet SA
Sunwing AB
Sunwing Hellas SA
Swedair AB
Tenerife Sol SA
Tenk SA
Travel Management Group, Sweden AB
Ucak Servisi AS
VHH Vereinigte Hotel-Holding GmbH
Vingreiser A/S
Vingreiser Norge A/S
Wideroe's Flyveselskap A/S

APPENDIX N

VIAÇAO AÉREA RIO-GRANDENSE (VARIG)

Parent Company

Fundaçao Ruben Berta

Subsidiaries (Except Wholly Owned Subsidiaries)

Agripec S.A. Agropecuária Ind. Com. Exportação
BANCO VARIG S.A.
Cia. Tropical de Hotéis
Cia. Tropical de Hotéis da Amazônia
Cia. Tropical de Hotéis do Nordeste
Cia. Tropical—Hotel Tambaú
Expressão Brasileira de Propaganda, Ltda.
Hotel de Bahia S.A.
Icaro Editora, Ltda.
Interlocadora S.A.
Rio-Sul Serviços Aéreos Regionais S.A.
Serviços Auxiliares de Transporte Aéreo S.A.
Sociedade Brasileira de Turismo Aéreo—"ROTATUR", Ltda.
Varig S.A. Arrendamento Mercantil
Varig Trading S.A.

FILED
OCT 30 1991
OFFICE OF THE CLERK

(5) (5)

Nos. 90-1604 and 90-1606

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1991

DAN MORALES, ATTORNEY GENERAL OF TEXAS,
PETITIONER,

v.

TRANS WORLD AIRLINES, INC., ET AL.,

ATTORNEY GENERAL OF CALIFORNIA, ET AL.,
PETITIONERS,

v.

TRANS WORLD AIRLINES, INC., ET AL.,

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONERS' REPLY TO THE BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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Nos. 90-1604 and 90-1606

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

DAN MORALES, ATTORNEY GENERAL OF TEXAS,
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ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONERS' REPLY TO THE BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

Dan Morales, Attorney General of Texas, sole Petitioner in No. 90-1604, and Daniel E. Lungren, Attorney General of California, a Petitioner in No. 90-1606, submit this reply to the Brief for the United States as Amicus Curiae ("Brief for the United States") filed herein in response to the Court's order

inviting the Solicitor General to express the views of the United States in these cases.[1]

The States agree with the Solicitor General's recommendation that the Court grant the petition in No. 90-1606 and summarily reverse the judgment below as to all states except Texas. Brief for the United States at 24.[2]

The States must respectfully disagree with the Solicitor General's recommendation that the Court deny review of the preemption issues in both cases. Brief for the United States at 24. The Solicitor General's advice to this Court did not follow the Court's own policy of limiting federal preemption. Without repeating the discussion of this issue contained in the petitions already on file, the States wish to make two points.

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1 Because of the short period of time between the receipt of the Solicitor General's brief and the filing of this reply brief, it has not been possible to obtain the requisite review of the 32 other petitioners in No. 90-1606. Therefore, Attorney General Lungren files this brief on his behalf only. The two petitioners joining in this brief will be referred to as the "States."

2 The States do not, however, agree with the Solicitor General's contingent recommendation that, in the event that the Court decides to review the preemption issue, the Court should only grant review in No. 90-1604 (the Texas case) and hold the petition in No. 90-1606 (the 33-state case). Brief for the United States at 23, fn. 16. Because those 33 states have never properly been in this litigation, review of the preemption decision alone could present those states the pyrrhic victory of winning on one issue of substantive law but having no decision on the jurisdictional issue. The Court should, at a minimum, also grant the petition in No. 90-1606 and summarily reverse the judgment below as to the other 33 states, since the district court lacked personal jurisdiction over them.

1. Now is the time for the Court to visit this issue.

The appellate courts have had ample opportunity to consider the scope of preemption of state law under the Federal Aviation Act, and have proven themselves divided, even in the same circuit.

The Solicitor General himself points the Court to an internal conflict within the Ninth Circuit. One case gives a narrow reading to the preemption question, as the States urge is proper. *West v. Northwest Airlines, Inc.*, 923 F.2d 657 (9th Cir. 1990), *petition for cert. pending*, No. 91-505. But an opinion handed down this year gives a broad sweep to preemption. *Federal Express Corp. v. California Public Utilities Comm'n*, 936 F.2d 1075 (9th Cir. 1991), *petition for cert. pending*, No. 91-502. Brief for the United States at 13-14.

Of course, as discussed at length in the petitions on file herein, the Ninth Circuit reasoning and result in *West* conflict directly with the reasoning and result reached by the Fifth Circuit here. Other circuits evince similar confusion.

Without rearguing the point at length, the States again urge the Court that a conflict of circuits now exists and that refusing review at this time will only foster further confusion. A dispositive opinion by this Court can bring an end to needless additional conflicting litigation.

2. Finding preemption must be the last resort.

Instead of reviewing the Federal Aviation Act with the intent of making federalism work by *avoiding* preemption, the Solicitor General focused only on those cases that best make the case for *seeking out and finding* preemption.

Rather than see how expansive a reading one can give the preemptive language of the Federal Aviation Act, as the Solicitor General has in effect done, the Court should grant review of these cases to affirm that preemptive language must be given the narrowest reading possible.

All laws "relating to rates, routes, or services" are preempted. 49 U.S.C. § 1305(a)(1). As a necessary corollary, all other laws are not.[3]

While the position taken by the Solicitor General fully and properly advocates the position of the Department of Transportation, the States urge that it does not follow the Court's oft-repeated instruction to "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

Primarily, the Solicitor General erred in seeking guidance from the sibyl of ERISA. The sole underpinning of the limitless reading he gives the "relates to" language of the Federal Aviation Act is the broad reading given by the Court to similar language in ERISA. Brief for the United States at 8-9. ERISA is a comprehensive statute which Congress adopted after a careful study of private retirement pension plans. *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 510 (1981); *Ingersoll-Rand Co. v. McClendon*, 111 S.Ct. 478, 482 (1990). As it relates to false advertising and consumer protection, the Federal Aviation Act is not at all comprehensive.

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3 It is unnecessary to review legislative history, either to support or to refute preemption. The language of the Act is clear.

Beyond that, the preempting provisions of ERISA "perhaps are not a model of legislative drafting." *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 739 (1985). Therefore, reference to ERISA's broadly-preemptive effect, based solely on the similarity of two words–"relates to"–ignores both the flaws of the ERISA language and its fundamental difference from the Federal Aviation Act.

ERISA preemption is not sweeping because of its "relates to" language; rather, that "relates to" language is read broadly because of the wide and inclusive sweep of the comprehensive ERISA scheme. *Ingersoll-Rand Co. v. McClendon*, 111 S.Ct. 478, 482 (1990). No such sweep exists in the Federal Aviation Act, nor should the Court strain to find one.

CONCLUSION

For the reasons stated herein and in the petitions already on file, both petitions for writ of certiorari should be granted.

Respectfully submitted,

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Supreme Court, U.S.
FILED
NOV 1 1991
OFFICE OF THE CLERK

Nos. 90-1604 and 90-1606

IN THE
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OCTOBER TERM, 1991

DAN MORALES, Attorney General of Texas, *et al.*,
Petitioners,

v.

TRANS WORLD AIRLINES, INC. *et al.*,
Respondents.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

SUPPLEMENTAL MEMORANDUM

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IN THE

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On Petitions for Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

SUPPLEMENTAL MEMORANDUM

Respondents submit this supplemental memorandum in response to the Acting Solicitor General's brief for the United States as *amicus curiae*.

INTRODUCTION

The United States, like the Fifth Circuit, concludes that "Section 105(a) of the Airline Deregulation Act of 1978 preempts the use by [the States] of [their] consumer protection laws to enforce the *NAAG Guidelines* against airline fare advertisements." U.S. Br. 7. This

conclusion, which is soundly rooted in an analysis of the statutory text and legislative history, draws further support from the striking and pervasive conflict that currently exists between federal and state regulatory policies relating to air fare advertising. *Id.* at 8-12, 9a-41a. Because the decision below was correct and "[t]here is no federal appellate decision to the contrary," *id.* at 7, the United States agrees with respondents that the issue of preemption presented by this case does not warrant further review.

The United States argues, however, that the Fifth Circuit erred in treating as intervenors the 33 States that participated in the proceedings in district court by filing pleadings, requesting and opposing relief, and appearing through counsel at oral argument. Although "recogniz-[ing] that the ruling below turns on the facts of this case and that the factual situation in this case is unusual, which ordinarily would mean that the Fifth Circuit's error would not warrant correction by this Court," *id.* at 22, the United States nonetheless urges the Court to take the extraordinary step of summarily reversing, apparently for no reason other than that the petitioners are States rather than private litigants. *Id.* at 23-24. But the Fifth Circuit's holding with respect to intervention is not merely tied to particular and peculiar facts; it also is manifestly correct as a matter of law. The United States' contention that the Fifth Circuit should be summarily reversed because it "clearly erred," U.S. Br. 8, 14, borders on frivolity.

ARGUMENT

1. The United States begins with the claim that the decision of the 33 States to participate in the proceedings in district court was a "reasonable and prudent" defensive measure. U.S. Br. 14. It was nothing of the kind. The States had not been named as defendants, nor had they been served with process. As long as they kept their distance, they could not be bound. It is a fundamental rule of due process that "[u]nless duly summoned to appear in a legal proceeding, a person not a privy may rest assured that a judgment recovered therein will not affect his legal rights." *Martin v. Wilks*, 490 U.S. 755, 763 (1989), *citing Chase Nat'l Bank v. Norwalk*, 291 U.S. 431, 441 (1934). *Accord, Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 110 (1969).

Each of the 33 States appeared in district court not out of prudence and caution but out of a desire to be heard on the merits of an issue in which it was deeply interested by virtue of its adoption of the *NAAG Guidelines*. The States' uninvited and spontaneous effort to influence the outcome of the litigation belies the United States' suggestion, *see* U.S. Br. 15-16, that, as to some of the States, there may have been no "real, substantive controversy between parties having adverse legal interests." *Railway Mail Ass'n v. Corsi*, 326 U.S. 88, 93 (1945).

2. The United States, although arguing that the Fifth Circuit erred in treating the 33 States as intervenors, *see* U.S. Br. 17-18, fails to explain in what alternative capacity it believes the States did appear. Under the Federal Rules of Civil Procedure and by long judicial tradition, a person not named or served as a party who nevertheless participates in a civil action in federal district court by filing pleadings, requesting or opposing relief, and appearing through counsel at oral argument, must do so in one of only two capacities, *i.e.*, as an intervenor or as an *amicus curiae*. *See generally* 1B *Moore's Federal Practice*, ¶ 0.411[6], at 442-43 (2d. 1991). There is no third

slot available for officious intermeddlers who seek to participate and be heard in the manner of parties without either assuming the risks of an intervenor or accepting the limitations of an *amicus*. *See United States v. Michigan*, 940 F.2d 143, 161-67 (6th Cir. 1991).

Consequently, the courts below, if they were to give effect to the 33 States' evident desire to take an active part in the proceedings, had to treat the States either as intervenors or as *amici*. This was something of a dilemma, for the States arguably looked like neither: they had not moved to join as intervenors, nor had they sought consent of the parties and moved to appear as *amici*. But this was, after all, a dilemma of the States' own making, and they should not now be heard to complain that it was not resolved to their complete satisfaction.

In any event, because the 33 States did not ask leave to appear as *amici*, because they satisfied the substantive requirements for permissive intervention under Fed. R. Civ. P. 24(b), and because they vigorously participated in the manner of parties, it was eminently reasonable to treat them as intervening defendants rather than as *amici*. Even when participation as *amicus* has been formally sought, a "district court lacking joint consent of the parties should go slow in accepting . . . an amicus brief." *Strasser v. Doorley*, 432 F.2d 567, 569 (1st Cir. 1970). *A fortiori*, when such participation has *not* been sought, it should not be granted.

At bottom, the 33 States were hoping to have their cake and eat it too. They wanted to participate in the proceedings in district court in the manner of full-blown parties while at the same time retaining the limited exposure of *amici*. The courts below correctly refused to sanction this inequitable and unorthodox maneuver. As the Ninth Circuit has explained, one who has intervened in substance has intervened in fact:

> the appellant never presented the court with a formal motion to intervene, but instead filed objections to appellees' summary judgment motion. The court properly viewed appellant's objections as a formal entry into the case . . . .

Adams v. Morton, 581 F.2d 1314, 1318 (9th Cir. 1978). *See also, e.g., In re Grand Jury Proceedings*, 654 F.2d 268, 271 (3d Cir.), *cert. denied*, 454 U.S. 1098 (1981). The 33 States, like the appellant in *Adams*, were properly viewed as intervening parties.

The United States further argues that even if the courts below were correct in treating the 33 States as intervenors, they erred in refusing to give effect to the States' purported reservation of a defense of lack of personal jurisdiction. U.S. Br. 16-17, 19-23. That argument is completely meritless. An intervenor has no defense of lack of personal jurisdiction: "the intervenor submits himself to the personal jurisdiction of the court by seeking to intervene in the action and cannot move to dismiss on that ground." 7C Wright, Miller & Kane, *Federal Practice & Procedure* § 1920 at 490 (1986). This rule reflects common sense: it would be both logically inconsistent and potentially abusive to allow litigants who have aggressively invoked the court's jurisdiction to claim in the same breath that that jurisdiction cannot be exercised to their detriment. *See Schneider v. Dumbarton Developers, Inc.*, 767 F.2d 1007, 1017 (D.C. Cir. 1985) (" 'the possibility that the plaintiff will be able to obtain relief against the intervenor-defendant' is part of the 'price' paid for intervention"), *citing District of Columbia v. Merit Systems Protection Bd.*, 762 F.2d 129, 132 (D.C. Cir. 1985). The court below did not err in following this settled rule. There is, moreover, no federal appellate authority to the contrary.

CONCLUSION

For the reasons stated here and in the brief in opposition, the petitions for writs of certiorari should be denied.

Respectfully submitted,

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v.

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ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether Section 105(a)(1) of the Airline Deregulation Act of 1978, 49 U.S.C. App. 1035(a)(1), which preempts "any" state laws "relating to rates, routes, or services of any air carrier," preempts state regulation of air fare advertising.

2. Whether a case or controversy exists between respondents and States that have not brought or threatened to bring an enforcement action against respondents for their air fare advertising.

3. Whether States not named as parties in the complaint waived their objection to personal jurisdiction by opposing a temporary restraining order.

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In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 90-1604

DAN MORALES, ATTORNEY GENERAL OF TEXAS,
PETITIONER

v.

TRANS WORLD AIRLINES, INC., ET AL.

No. 90-1606

ATTORNEY GENERAL OF CALIFORNIA, ET AL.,
PETITIONERS

v.

TRANS WORLD AIRLINES, INC., ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's order inviting the Solicitor General to express the views of the United States in these cases.

STATEMENT

1. The National Association of Attorneys General (NAAG) is a voluntary association, comprised of representatives of the attorneys general of the 50 States, various territories, and the District of Columbia. In 1987, a NAAG task force undertook a study of advertising and marketing practices in the airline industry with an eye to consumer concerns in the areas of airline advertising, frequent flyer programs, and compensation for denied boarding. Pet. App. 36a.[1] Following that study, in December 1987, NAAG adopted Air Travel Industry Enforcement Guidelines. See National Ass'n of Attorneys General, Task Force on the Air Travel Industry, *Guidelines and Commentary* (Apr. 1988) (*NAAG Guidelines*), App. B, *infra*. The *NAAG Guidelines*, which are not law, purport to explain in detail how state consumer protection laws apply to, inter alia, air fare advertising. *Id.* introduction.

The *NAAG Guidelines* provide that any print or broadcast advertisement which "provides air fares or other price information" must be in "clear and conspicuous" language and be non-deceptive. *NAAG Guidelines* § 2.0. Deception may result from omitting or obscuring a "material restriction." *Ibid.* The *NAAG Guidelines* specify what is "clear and conspicuous." § 1.5. In printed advertisements, disclosure must be of a certain type size, depending on the size of the advertisement. § 1.5(a). In radio and television commercials, disclosure must be "made orally and [be] as clear and understandable in pace and volume as the fare information." § 1.5(b). A "[m]aterial restriction" is defined as any restriction, limitation or requirement "which affects the use or refundability of a ticket, and which is not generally applicable to all classes of fares or tickets (such as standard conditions of carriage.)." § 1.8. The *NAAG Guidelines* set

[1] "Pet. App." refers to the appendix to the certiorari petition in No. 90-1604.

forth a detailed list of restrictions that must appear in print advertisements, § 2.1, and a separate list of disclosures that must be made in broadcast commercials, § 2.2. Additionally, the *NAAG Guidelines* require that the "total advertised price" must include any fuel, tax, or other surcharge, § 2.5; that if the advertised one-way price is available only as part of a round-trip purchase, "this restriction, together with the full round-trip fare, must be advertised in a clear and conspicuous manner, at least as prominently as the one-way fare," § 2.6; and that certain restrictions must be observed on use of the words "sale," "discount," "reduced," or similar terms, § 2.7. Finally, the *NAAG Guidelines* contain detailed requirements for frequent flyer programs, §§ 3.0-3.9, as well as offers of compensation to persons for voluntarily denied boarding, § 4.0.

2. a. In February 1988, the attorneys general of Texas, Colorado, Kansas, Massachusetts, Missouri, New York, and Wisconsin jointly announced that they intended to "bring airline advertisements into compliance with standards in the [NAGG] Guidelines for fare advertising." 2 R. Exh. H, Att. A. In November 1988, the attorneys general of Texas, California, Massachusetts, New York, and Washington notified respondents Trans World Airlines, Inc. (TWA), Continental Airlines, Inc. (Continental), and British Airways PLC (British Air) in a letter that some of their advertisements violated the *NAAG Guidelines* and the States' false advertising and deceptive practices laws by prominently advertising the ticket price while less prominently disclosing taxes, surcharges, and fees. The letter threatened prosecution. Pet. App. 15a.

b. On January 23, 1989, three respondents, TWA, Continental, and British Air,[2] brought this action. Pet.

[2] The remaining airlines-respondents intervened in this case at a later point. Pet. App. 16a. For the sake of convenience, we will refer to the original plaintiffs and the plaintiff-intervenors collectively as respondents.

App. 37a. Respondents claimed that Section 105(a)(1) of the Airline Deregulation Act of 1978, 49 U.S.C. App. 1305(a)(1), which prohibits a State from enacting or enforcing any state law "relating to rates, routes, or services," preempted the Texas Deceptive Practices Consumer Protection Act, Tex. Bus. & Comm. Code §§ 17.41 *et seq.* (Vernon 1991), and that enforcement of the *NAAG Guidelines* through state law would violate the Commerce Clause, Art. I, § 8, Cl. 3; the Compact Clause, Art. I, § 10, Cl. 3; and the First Amendment. Compl. 11-26 (filed Jan. 23, 1989); App. C, *infra*. The Texas Attorney General was the only named defendant, *id.* at 43a, but respondents alleged that he was acting "in concert with" and "on behalf of" other attorneys general, *id.* at 44a, and that Texas law and "any other states' laws" were invalid when construed with the *NAAG Guidelines*, Compl. paras. 33, 45, 49-50, 55-57; App. C, *infra*, 55a, 59a, 60a, 61a-62a. Respondents sought a declaratory judgment that implementation or enforcement of the *NAAG Guidelines* "through Tex. Bus. & Com. Code § 14.71 *et seq.* or any other state law is unconstitutional," Compl. 25-26; App. C, *infra*, 62a-63a, and an injunction against the Texas attorney general "and all other persons acting for or in active concert or participation with [him]", *id.* at 63a-64a. Respondents also sought a temporary restraining order. Pet. App. 37a.

Because of respondents' theory that various state attorneys general were acting "in concert" with the Texas attorney general and because of the phrasing of respondents' request for injunctive relief, other States became concerned that the temporary restraining order sought by respondents would reach beyond the State of Texas and would apply to them. Accordingly, four days after respondents filed their complaint, the attorneys general of 33 States filed a motion in district court asking the court to deny the TRO. Pet. App. 38a.[8] In the opening

[3] Motion of Specially Appearing States to Deny Plaintiffs' Motion for Temporary Restraining Order or in the Alternative Motion to Extend Date for Hearing on Temporary Order (filed Jan. 27, 1989) (hereinafter Motion). Because of its importance to the case, we have reprinted the motion as Appendix D to this brief.

line of their motion, the 33 States said that it was filed "[w]ithout admitting or submitting to the subject matter jurisdiction of this Court and without admitting that this Court has personal jurisdiction over them," App. D, *infra*, 65a. The 33 States argued that respondents' motion for a TRO should be denied "because the injunctive relief [respondents] are seeking could affect the sovereign rights of states which have neither been served nor named as defendants in the instant action." *Id.* at 66a. In the alternative, the 33 States asked for a reasonable postponement of the TRO hearing to allow the States time to respond and "to decide whether to seek leave from this Court to file an Amicus Curiae Brief or to seek leave to intervene." *Id.* at 68a.

Following a hearing, at which one representative of the 33 States participated, the district court granted a preliminary injunction, ruling that respondents were likely to prevail on their preemption claim. Pet. App. 48a-50a. The injunction, however, enjoined not only the Texas attorney general but also "all other persons acting in concert or participation" with him under "Tex. Bus. & Comm. Code § 17.41 *et seq.*, or any other provision of state law." *Id.* at 50a. The Kansas attorney general thereafter filed a motion on his own behalf seeking to clarify that the preliminary injunction was limited to Texas and Texas law. Shortly thereafter, the district court granted this motion. Pet. App. 51a.

c. Respondents later moved to broaden the preliminary injunction to cover the 33 States on the grounds that they were acting "in concert" with Texas; that, by their prior actions in the case, the 33 States had "*de facto* intervened" in this suit; and that suits brought by some attorneys general after the court granted the clarification motion filed by the Kansas attorney general action threat-

ened to injure respondents. Pet. App. 58a. The court granted respondents' motion, ruling that the presence of the 33 States was necessary to resolve the controversy between respondents and all of the States. *Id.* at 58a-60a. The court expressly declined to accept respondents' claim that the 33 States should "be *deemed* intervenors"; instead, the court joined the States under Rule 19, Fed. R. Civ. P. Pet. App. 60a.

3. The court of appeals affirmed. Pet. App. 13a-47a; *TWA* v. *Mattox*, 897 F.2d 773 (5th Cir.), cert. denied, 111 S. Ct. 307 (1990). At the outset, the court upheld the district court's judgment that respondents were likely to prevail on their preemption claim. The court reasoned that, under Section 105(a)(1) of the Airline Deregulation Act of 1978, Congress had expressly preempted all state regulation of matters that "relate to" air fares, and that air fare advertising relates to air fares. In that regard, the court agreed with the Seventh Circuit that air fare advertising relates to air fares under Section 105 (a)(1) because "[p]rice advertising surely 'relates to' price." *Illinois Corporate Travel* v. *American Airlines*, 889 F.2d 751, 754 (1989), cert. denied, 110 S. Ct. 1948 (1990). Pet. App. 32a-33a.

The court of appeals also concluded that the 33 States other than Texas were properly enjoined. Pet. App. 41a-43a. The court did not decide whether the district court properly joined the 33 States under Fed. R. Civ. P. 19; instead, the court of appeals held that, by their actions, the 33 States had become "de facto" intervenors. The court reasoned that respondents had filed suit and sought relief against only the Texas attorney general when he was acting under Texas law, but the 33 States nonetheless "filed a motion asking the district court to deny [respondents'] motion for a TRO against enforcement of Texas laws," which the court described as a request for "affirmative relief," *i.e.*, "an affirmative act by the [district] court that would benefit their states." Pet. App. 42a. The court stated that while a party could

object to personal jurisdiction either in a pre-answer motion or in the answer itself, the 33 States were not parties when they filed their motion. For that reason, the court said that the 33 States "had no basis for objecting to the court's jurisdiction as they had not been named defendants and no attempt had been made to bring them before the court by process." *Ibid.* At the same time, the court said that the 33 States "became *de facto* intervenors when the Attorney General of Kansas filed the motion, sought relief and participated in the TRO hearing on their behalf." *Ibid.* By so doing, the court held, the 33 States "waived any objection to the jurisdiction of the court over their persons as representatives of their respective states." *Id.* at 43a.

Texas and the 33 States sought review in this Court, but this Court denied certiorari. 111 S. Ct. 307, 308 (1990).

4. Thereafter, the district court entered a final injunction against all 34 States, ruling that Section 105 (a)(1) of the Airline Deregulation Act of 1978 preempted the Texas Deceptive Trade Practices Act and the similar laws of the other 33 States as applied to the regulation of airline fare advertisements. Pet. App. 8a-12a. The court of appeals affirmed on the basis of its earlier opinion. *Id.* at 1a-7a.

DISCUSSION

The court of appeals was correct in holding that Section 105(a)(1) of the Airline Deregulation Act of 1978 preempts the use by Texas of its consumer protection laws to enforce the *NAAG Guidelines* against airline fare advertisements. There is no federal appellate decision to the contrary. Moreover, if the injunction challenged in No. 90-1606 is reversed, as we believe it should be, there will be even greater opportunity for other courts to address the Section 105(a)(1) preemption issue. Accordingly, the petition for a writ of certiorari in No. 90-1604 should be denied.

At the same time, the Fifth Circuit clearly erred in upholding the injunction insofar as it applied to the other 33 States. Although the 33 States were not named in or served with respondents' complaint, the complaint could reasonably be read to have sought to have the 33 States enjoined. Out of reasonable caution and prudence, the 33 States filed a motion in which—after expressly noting their objection to personal jurisdiction—they asked only that the TRO be denied or that the hearing be postponed so that they could decide how best to respond. Such actions cannot remotely be deemed a waiver of the 33 States' objection to personal jurisdiction, and the Fifth Circuit's holding to the contrary is clearly wrong. In fact, the court of appeals' error is so obvious that this Court should grant the petition in No. 90-1606 limited to Question 2 and summarily reverse the judgment below.

1. *No. 90-1604.* Section 105(a)(1) of the Airline Deregulation Act of 1978, 49 U.S.C. App. 1305(a)(1), expressly preempts the enactment or enforcement of any state law "relating to" airline rates. As the Seventh Circuit correctly noted, "[p]rice advertising surely 'relates to' price," *Illinois Corporate Travel* v. *American Airlines*, 889 F.2d at 754. More specifically, the *NAAG Guidelines* "relate to" airline rates in a sense that implicates the congressional purpose behind Section 105, because the *NAAG Guidelines* raise competitive issues that Congress intended to be resolved on a uniform basis on the federal level. Accordingly, the court of appeals was correct in concluding that state consumer protection laws " 'relate to' rates when applied to airline fare advertising." Pet. App. 32a-33a.

a. Congress did not limit preemption to state regulation "of" airline rates. Section 105 of the Federal Aviation Act of 1958 is far broader: It expressly preempts all State laws "relating to" air carrier rates. State law "relates to" a subject "if it has a connection with or reference to" it, *Metropolitan Life Ins. Co.* v. *Massachusetts*, 471 U.S. 724, 739 (1985); *Shaw* v. *Delta Airlines, Inc.*,

463 U.S. 85, 96-97 (1983) (interpreting that phrase in ERISA), and here there is a direct, immediate, and strong relationship between advertising and price. This Court has recognized that advertising restrictions "serve[] to increase the [consumers'] difficulty of discovering the lowest cost seller of acceptable ability," which leaves sellers "isolated from competition" and reduces "the incentive to price competitively," *Bates* v. *State Bar*, 433 U.S. 350, 377 (1977). Studies in other fields have confirmed that consumers pay higher prices when advertising is restricted. See Benham, *The Effect of Advertising on the Price of Eyeglasses*, 15 J. Law & Econ. 337 (1972); Cady, *An Estimate of the Price Effects of Restrictions on Drug Price Advertising*, 14 Econ. Inquiry 493 (1976). The statutory language therefore does not support petitioners' claim that federal preemption extends only to State laws that fix airline rates. See 90-1604 Pet. 9; 90-1606 Pet. 16.

b. The legislative history also does not support petitioners' theory. Prior to 1978, the Civil Aeronautics Board (CAB) had consumer protection authority over airlines under Section 411 of the Federal Aviation Act of 1958, 49 U.S.C. App. 1381, but shared that authority with the States, because there was no federal preemption provision. See *Nader* v. *Allegheny Airlines, Inc.*, 426 U.S. 290 (1976). Section 105 was adopted in 1978 as part of the Airline Deregulation Act, with the purpose of avoiding "a confusing system of dual regulation" and granting "sole responsibility" for regulating interstate carriers to the CAB. S. Rep. No. 631, 95th Cong., 2d Sess. 98 (1978); see H.R. Rep. 1211, 95th Cong., 2d Sess. 16 (1978). "In reducing federal economic regulation of the field to allow the forces of free competition to rule the marketplace, Congress obviously did not intend to leave a vacuum to be filled by the Balkanizing forces of state and local regulation." *New England Legal Found.* v. *Massachusetts Port Auth.*, 883 F.2d 157, 173 (1st Cir. 1989).

Under the pre-1978 regulatory regime, price-based advertising was of little importance because the CAB did not allow air carriers freely to adjust their fares and price competition was absent. Under deregulation, price became a principal means of competing, and price advertising multiplied immensely. At the same time, a complex fare structure emerged, owing to several factors: A large part of air carriers' costs is joint and common, and is not directly attributable to any one service or class or passenger; the marginal cost of providing additional service is often low; most carriers operate with substantial excess capacity overall, but face heavy demand for some flights; and air travel is highly seasonal and cyclical. Some persons (typically business travelers) have a demand for air travel that is relatively inelastic, but they need to be able to travel at particular times, on short notice, and in the shortest span of time. Others (frequently tourists) are sensitive to changes in the price of air travel, but have less stringent demands in terms of schedules and notice. Airlines seek to recover their joint and common costs by charging higher fares to persons with an inelastic demand for air travel and by filling otherwise empty seats with other customers who are charged lower fares (that still exceed marginal cost).

To preserve this complex system, airlines impose restrictions on lower-priced tickets, making them a less valuable commodity that would not be attractive or even available to customers desiring to fly on short notice with an unrestricted schedule. The convergence of increasing price competition and increasing fare complexity raises difficult issues from the standpoint of regulating price advertising under the consumer protection provision of the Federal Aviation Act of 1958. As price advertising becomes an increasingly important element in the marketplace for air travel, it becomes increasingly difficult to convey in any advertisement the full complexity of the fare structure and ticket restrictions, while keeping the advertisement sufficiently short and clear so that it can serve as an affordable and effective price competition tool.

The DOT must exercise its consumer protection authority "in the interest of the public," 49 U.S.C. App. 1381(a), which the Airline Deregulation Act of 1978 defined to include "maximum reliance on competitive market forces," 49 U.S.C. App. 1302(a)(4). This duty obliges the DOT to take competitive considerations into account in its proceedings involving airline fare advertisements, a responsibility that state attorneys general may not share.

In this regard, the DOT has proposed to codify its enforcement policy, which differs from the *NAAG Guidelines* in at least two significant respects. Specifically, the DOT's proposed rule would permit airlines (1) to advertise fares net of certain government-imposed or government-approved charges, provided the charges are "clearly and conspicuously" stated elsewhere in the advertisement, and (2) to advertise one-way fares available only as part of a roundtrip purchase, provided the roundtrip condition is clearly stated in the advertisement. 54 Fed. Reg. 31,052 (1989). In the notice of proposed rulemaking, the DOT tentatively concluded that requiring each airline to list a single fare that included all charges would "tend to limit airline price competition" by making certain types of advertisements "difficult or impossible." *Id.* at 31,053. "The specific charges that would be permitted to be listed separately either are limited, or apply only in certain markets or for certain flights, thus making it difficult or impossible to publi[s]h advertisements with one way and round-trip fares to multiple destinations and include charges in single advertised rates." *Ibid.*[4]

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[4] An example may illustrate this point. Soon, U.S. airports will begin imposing passenger facility charges (PFCs) of up to $3 per passenger per airport, up to a total of $12 per trip per passenger, to be collected by air carriers. 56 Fed. Reg. 24,254 (1991). Thus, the total price of a ticket may vary by up to $12 depending on the embarkation, disembarkation, and connecting airports to be used by a traveller. If the additional charges had to be included in

Of course, preservation of competition does not mean that advertisements spreading false or deceptive information should be allowed. Deceptive advertisements not only injure consumers and impair competition, they also violate federal law. The DOT has the authority to proceed against air carriers for "unfair or deceptive practices," 49 U.S.C. App. 1381, and has exercised that authority on numerous occasions. In proceedings concerning deceptive airline advertisements, however, care must be taken not to impose, in the name of "full disclosure," requirements that discourage price competition. The DOT's ability to regulate airline advertising in a competition-sensitive manner, however, would be undermined if airline fare advertising must also comply with the perhaps quite different regulatory policies of various state attorneys general. The purpose of Section 105 was to preserve the DOT's ability to implement the federal policy in favor of price competition by preempting the enactment or enforcement of state laws "relating to" airline rates; that purpose is fully implicated when the States attempt to regulate airline fare advertisements.

c. There is no conflict among the circuits on the preemption question presented in the petition. In fact, this case is the only federal appellate decision addressing whether federal law preempts state regulations of airline fare advertising.[5]

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the total advertised air fare, as the *NAAG Guidelines* require, as many as 13 fares might have to be listed in an air fare advertisement for just one city-pair market (*e.g.*, Washington to Los Angeles), since the total price might vary according to whether connecting flights are used involving airports charging the PFC and what those airports are.

[5] In *Illinois Corporate Travel, Inc.* v. *American Airlines, Inc.*, *supra*, the Seventh Circuit concluded that Section 105 preempts state law requiring an air carrier to deal with a travel agent refusing to respect a contract restricting advertising of discount rates. The court did not decide, however, whether all state law

Nor does the decision below conflict with *Nader* v. *Allegheny Airlines, Inc.*, 426 U.S. 290 (1976). In *Nader*, this Court held that the CAB's authority under Section 411 of the Federal Aviation Act of 1958, 49 U.S.C. App. 1381, to issue cease-and-desist orders against deceptive practices did not empower the Board to immunize airlines from state law tort suits for misrepresentation in connection with overbooking. *Nader* was decided before the Airline Deregulation Act of 1978, including Section 105(a)(1), was enacted, so this Court had no opportunity in *Nader* to consider the effect of that law.

The decision below does not conflict with the Ninth Circuit decisions cited by petitioners. *West* v. *Northwest Airlines, Inc.*, 923 F.2d 657 (9th Cir. 1990), petition for cert. pending, No. 91-505, concluded that Section 105(a)(1) does not preempt an airline passenger's suit against an airline under state contract law for overbooking. That issue is different from the one presented here.[6] To be sure, the Ninth Circuit stated a broad rationale in that case—*viz.*, that Section 105 "preempts claims only when the underlying statute or regulation itself relates to airline services," 923 F.2d at 660—and that rationale could be read to deny preemption in this case. At the same time, a subsequent recent Ninth Circuit decision is inconsistent with such a broad reading of *West*, because it held that Section 105(a)(1) preempts state regulation

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regulation of deceptive advertising is preempted. 889 F.2d at 755. In addition, only one intermediate state appellate court has addressed this question. *People* v. *Western Airlines, Inc.*, 155 Cal. App. 3d 597, 202 Cal. Rptr. 237, cert. denied, 469 U.S. 1132 (1984). That case held that Section 105 does not preempt a state civil enforcement action against allegedly misleading statements implying fare savings in airline advertising. The disagreement between the Fifth Circuit's decision in this case and one state intermediate appellate court decision, however, does not warrant resolution by this Court.

[6] The DOT's overbooking rules recognize that passengers have an action under state contract law against an airline if passengers are adversely affected by the airline's overbooking. See 14 C.F.R. Pt. 250.

of trucking rates and service when applied to the trucking operations of an aircargo carrier, on the ground that the state regulations "bear on" or "affect" the price. *Federal Express Corp.* v. *California Public Utilities Comm'n*, 936 F.2d 1075 (1991), petition for cert. pending, No. 91-502.[7] Accordingly, it is unclear what position the Ninth Circuit would take in a case involving airline fare advertising.[8]

2. *No. 90-1606.* The court of appeals clearly erred in ruling that the 33 States waived their objection to personal jurisdiction by filing a motion in district court opposing entry of a TRO. The States' decision to oppose the TRO was reasonable and prudent given the artful phrasing of respondents' complaint. In any event, there is no legal basis for ruling that the 33 States' Motion waived

[7] The Ninth Circuit has also ruled that Section 105(a)(1) does not preempt a state regulation barring third parties from monitoring telephone conversations, as applied to airline officials seeking to monitor customer calls to ticket agents. *Air Transport Ass'n* v. *Public Utilities Comm'n*, 833 F.2d 200 (1987), cert. denied, 487 U.S. 1236 (1988). The question presented in that case, however, differs considerably from this one. What is more, the Ninth Circuit made clear in that case that "[t]his is not, however, an appropriate case for the definitive resolution of the scope of federal preemption under the Deregulation Act," because Section 105(a)(1) does not create a private right of action. 833 F.2d at 207.

[8] The decision below also does not conflict with *Alaska* v. *DOT*, 868 F.2d 441 (D.C. Cir. 1989). The question there was whether Alaska had standing to challenge on procedural grounds unpublished DOT orders interpreting Section 411 of the Federal Aviation Act of 1958 as permitting the separate statement of certain charges in advertised fares. The DOT argued that the State lacked standing because another DOT order, not challenged in that lawsuit, also permitted that advertising practice and thus pre-empted the law that Alaska sought to protect. The court of appeals disagreed with the DOT's interpretation of its prior order and found that Alaska had standing because the challenged orders "provide the only possible basis for preemption." 868 F.2d at 444. *Alaska*, however, did not consider whether Section 105(a)(1) supplied an alternative basis for preemption, and thus did not consider the question in this case.

their objection to the personal jurisdiction of the district court.

a. There is a threshold jurisdictional issue: 28 of the 33 States contend that there is no case or controversy between respondents and them. In its opinion upholding the permanent injunction, the Fifth Circuit declined to address this question on the ground that that court had implicitly rejected the States' claim in the course of upholding the preliminary injunction. Pet. App. 6a. To our knowledge, however, nothing in the record shows that 25 of the 33 States have brought or expressly threatened to bring enforcement actions against respondents for their air fare advertising.[9] In addition, it is an open ques-

[9] Petitioners in No. 90-1606 claim (Pet. 23) that no case or controversy exists concerning 28 of the 34 States subject to the district court's permanent injunction. That claim rests on the premise that only six States (California, Kansas, Massachusetts, New York, Texas, and Washington) "have threatened or initiated any legal action under any of their respective consumer protection statutes against any of the airline plaintiffs." *Ibid.* The record, however, contains a February 3, 1988, memorandum addressed to "Airlines and other interested parties" and signed by, among others, the attorneys general of three additional States, Colorado, Missouri, and Wisconsin, which threatens an enforcement action against any airline violating § 2.5 of the *NAAG Guidelines* (relating to inclusion of additional charges in air fares). That brings to 9 the number of States that have threatened enforcement, leaving 25 States that have not threatened to bring an enforcement action, but that are subject to the district court's permanent injunction. Of those 25 States, two, Arkansas and Maine, have not joined in the petitions for certiorari in Nos. 90-1604 and 90-1606.

In their Brief in Opposition, respondents do not identify any action taken or threatened by these 25 States that satisfies the requirements of Article III. Instead, respondents rely on "the non-Texas petitioners' precipitate entry into the case" and "their demand that they be left free to 'enforce[] . . . their state law in their state court,'" Br. in Opp. 14, quoting Pet. App. 39a. As explained below, however, the States did not act precipitously by filing their Motion. Moreover, respondents' excerpt from the opinion below is misleading. The full sentence, which is taken from the argument of the Kansas Attorney General at the TRO hearing, appears as fol-

tion whether a State's participation in the NAAG's decision to adopt the *NAAG Guidelines* without more constitutes the "credible threat of prosecution" necessary to establish a case or controversy in a pre-enforcement action seeking to enjoin a State from enforcing one of its laws, *Babbitt* v. *United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979). Compare *International Longshoremen's & Warehousemen's Union* v. *Boyd*, 347 U.S. 222 (1954); *Public Service Comm'n* v. *Wycoff Co.*, 344 U.S. 237 (1952). Cf. *FTC* v. *Standard Oil Co.*, 449 U.S. 232 (1980).

There is no need, however, for the Court to resolve that issue at this time. The Article III question affects only 25 of the 33 States that filed the petition in No. 90-1606, because there is a case or controversy between respondents and eight of the 33 States. It therefore is unnecessary to resolve the jurisdictional question in order to dispose of the remaining questions in No. 90-1606. See *General Bldg. Contractors Ass'n* v. *Pennsylvania*, 458 U.S. 375, 402-403 n.22 (1982); *Babbitt*, 442 U.S. at 299 n.11. In addition, the Fifth Circuit clearly erred in ruling that the 33 States had waived their objection to personal jurisdiction, and the judgment below should be summarily reversed on that point. Since this Court has jurisdiction to reverse the judgment below on that point and since doing so will dispose of that judgment with respect to all 33 States, there is no present need to resolve the subject matter jurisdiction question presented in No. 90-1606.

b. Rule 12(h)(1) of the Federal Rules of Civil Procedure directly addresses the issue whether the claim of lack of personal jurisdiction can be waived. It provides that a defendant waives the defense of lack of personal

lows in the court of appeals' opinion: "The bottom line . . . is that individual states should not be precluded in advance *as they consider* enforcement of their state law in their state court." Pet. App. 39a (emphasis added).

jurisdiction if he files certain motions before filing his answer and fails to include that defense in the motion.[10] That Rule applies only to the parties to a lawsuit, however, and the 33 States were not parties to this action when they filed their Motion. Pet. App. 42a. Accordingly, the States did not waive their personal jurisdiction defense by operation of Fed. R. Civ. P. 12(h)(1). Moreover, the States expressly reserved their personal jurisdiction objection; they argued that they should not be enjoined because they had not been named in or served with the complaint; and they maintained that each State independently enforces its own laws. Those arguments were sufficient to preserve the 33 States' objection to personal jurisdiction. Cf. *Wyrough & Loser, Inc.* v. *Pelmor Lab., Inc.*, 376 F.2d 543, 547 (3d Cir. 1967) (rejecting claim that opposing a preliminary injunction request by a party that does not raise a personal jurisdiction objection per se waives that defense; finding waiver only because the defendant opposed request without noting in any way a personal jurisdiction objection and without asking for a continuance of the hearing to consider this issue).

The court of appeals acknowledged that the 33 States were not parties to this action, but considered that fact irrelevant because the States should be deemed "de facto intervenors." Pet. App. 42a. Here as in many other areas of the law, the Latin phrase "de facto" is perhaps best translated as "not really." The so-called "de facto intervention" doctrine represents a willingness by some courts to overlook nonprejudicial defects in the interven-

[10] *Chilicky* v. *Schweiker*, 796 F.2d 1131, 1136 (9th Cir. 1986), rev'd on other grounds, 487 U.S. 412 (1988); *Myers* v. *American Dental Ass'n*, 695 F.2d 716, 720-721 (3d Cir. 1982), cert. denied, 462 U.S. 1106 (1983); *Rauch* v. *Day & Night Mfg. Corp.*, 576 F.2d 697, 701-702 (6th Cir. 1978) (collecting cases); *Union Camp Corp.* v. *Dyal*, 460 F.2d 678, 684 (5th Cir. 1972); *Guardian Title Co.* v. *Sulmeyer*, 417 F.2d 1290, 1291-1292 (9th Cir. 1969); *Varone* v. *Varone*, 392 F.2d 855, 857 (7th Cir. 1968). See also, *e.g.*, *Pardazi* v. *Cullman Medical Center*, 896 F.2d 1313, 1317-1318 (11th Cir. 1990).

tion requirements of Fed. R. Civ. P. 24(c). See 7C C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 1914, at 413-416 (1986).[11] That doctrine does not apply here, because the 33 States' Motion made clear that they had not yet decided whether or how to participate in this lawsuit—*i.e.*, "whether to seek leave from this Court to file an Amicus Curiae Brief or to seek leave to intervene," App. D, *infra*, 68a—and needed more than two days' notice to make that determination. The court of appeals simply misread the States' Motion.[12]

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[11] See, *e.g.*, *Gatz* v. *Southwest Bank of Omaha*, 836 F.2d 1089, 1093 (8th Cir. 1988); *International Marine Towing, Inc.* v. *Southern Leasing Partners, Ltd.*, 722 F.2d 126, 129 (5th Cir. 1983); *Spring Constr. Co.* v. *Harris*, 614 F.2d 374, 376-377 (4th Cir. 1980); *United States* v. *RMI Co.*, 599 F.2d 1183, 1186-1187 (3d Cir. 1979); *Martindell* v. *IT&T*, 594 F.2d 291, 294 (2d Cir. 1979); *Roach* v. *Churchman*, 457 F.2d 1101, 1104 (8th Cir. 1972); *Smartt* v. *Coca-Cola Bottling Corp.*, 337 F.2d 950 (6th Cir. 1964), cert. denied, 380 U.S. 934 (1965). Contra *Spangler* v. *Pasadena City Bd. of Educ.*, 552 F.2d 1326 (9th Cir. 1977) (Kennedy, J.) (ruling that district court erred by changing desegregation plan on motion of parents whose children were affected by the plan but who did not become parties under Fed. R. Civ. P. 24).

[12] The so-called "de facto intervenor" doctrine has principally been used as a basis for allowing persons who were technically non-parties, but who participated in the trial court litigation and who are affected by a trial court order, to take an appeal from that order despite the rule, see, *e.g.*, *Marino* v. *Ortiz*, 484 U.S. 301, 304 (1988), that only the parties to a case may do so. See, *e.g.*, *Roach* v. *Churchman*, 457 F.2d at 1104. That application of this doctrine has no relevance here. In deeming the 33 States to be "de facto intervenors," the court of appeals did not excuse a nonprejudicial defect in the Rule 24(c) process. On the contrary, the court required the States to satisfy the strict pleading requirements that Fed. R. Civ. P. 12 imposes on a person named in the complaint as a defendant, even though the States had no notice that the Rule 12 requirements applied to them. In so doing, the court transformed a principle designed to excuse "a procedural blunder of no real significance," 7C C. Wright, A. Miller & M. Kane, *supra* § 1914, at 415, into a trap for any unwary third party who is at risk of being enjoined under Rule 65(d), but who is not given an opportunity even to protest the entry of a TRO on the ground that the court

The Fifth Circuit also relied on the rule that an intervenor may not object to the personal jurisdiction of a court while simultaneously asking for "affirmative relief." Pet. App. 42a. The rationale for that rule is that "a party who invoked the power of the court for his own purposes should not be allowed the inconsistent objection that the forum was personally inconvenient for him." 5 C. Wright & A. Miller, *supra*, § 1397, at 787-788.[13] But that principle also does not apply here, because the States' simply opposed the affirmative relief sought by *respondents*.

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lacks personal jurisdiction over that party. We are aware of no precedent and no rationale justifying that result.

Respondents have cited only one decision, *In re Grand Jury Proceedings*, 654 F.2d 268 (3d Cir. 1981), in which a court relied on this doctrine to penalize a non-party, and that case is no precedent for this one. There, the defendant in a state criminal prosecution filed a motion seeking the disclosure of exculpatory material held by a federal grand jury. The district court ordered the U.S. Attorney to assemble the relevant materials and to consult with the state trial judge. The state trial judge sought to appeal the order, but his appeal was dismissed on the ground that he was not a party. *In re Grand Jury Proceedings*, 625 F.2d 1106 (3d Cir. 1980). When the defendant sought to enforce the order, the state trial judge filed a reply opposing the defense effort. By filing such a reply, the court of appeals held, the state judge waived his claim that the district court lacked personal jurisdiction. 654 F.2d at 271. Even if that decision is correct, it bears little resemblance to this case: In this case, there was no prior court of appeals' decision holding that the 33 States were not parties to this lawsuit.

[13] See also, *e.g.*, *Grammenos* v. *Lemos*, 457 F.2d 1067, 1070 (2d Cir. 1972) (collecting cases). Justice Holmes penned the classic formulation of this principle: "We assume that the defendant lost no rights by pleading to the merits, as required, after saving its rights. But by setting up its counterclaim the defendant became a plaintiff in its turn, invoked the jurisdiction of the court in the same action and by invoking submitted to it." *Merchants Heat & Light* v. *J.B. & Sons*, 204 U.S. 286, 289 (1907) (citations omitted). See *City of Santa Clara* v. *Kleppe*, 428 F. Supp. 315 (N.D. Cal. 1976) (intervenor waives objection to personal jurisdiction by asserting claim to payment from escrow fund).

Regardless of whether the States' decision to file the Motion and appear at the TRO hearing is viewed in hindsight as a reasonable litigation step,[14] the Motion does

[14] The Fifth Circuit believed that the 33 States had no reason to fear they would be enjoined under the TRO. Pet. App. 42a. The complaint proves the court wrong.

The complaint alleged that the named defendant, the Texas attorney general, acted "in concert with numerous other states' attorneys general" in issuing the *NAAG Guidelines*, Compl. para. 6; App. C, *infra*, 44a, and that "[respondents] have been threatened with an enforcement action by the Attorney General of Texas and by other states' attorneys general acting in concert with him," *id.* para. 46, at 59a. The complaint further alleged that the "concerted activities" of the various States in connection with the *NAAG Guidelines* were "an illegal agreement or compact among the states." *Id.* para. 49, at 60a. In that connection, the complaint asserted that respondents "are entitled both to a declaration that the Guidelines are void and unenforceable, *and an injunction preventing any attempt by the Attorney General of Texas, or any NAAG member in active concert or participation with him, from enforcing the Guidelines through their state laws.*" *Id.* para. 50, at 60a. (emphasis added). Given those allegations, respondents' prayer for relief could readily have troubled States that had participated in the adoption of the *NAAG Guidelines*. The prayer sought declaratory relief and an order enjoining the Texas attorney general "*and all other persons acting for or in active concert with* [*him*], from taking any action against plaintiffs pursuant to Texas Bus. & Comm. Code §§ 17.41 *et seq. or any other state law* in conjunction with the NAAG Guidelines" regarding airline rates, routes or services. App. C, *infra*, 63a-64a (emphasis added). Moreover, respondents' request for a TRO and the memorandum respondents filed along with their TRO request sought to have the States enjoined under Fed. R. Civ. P. 65(d), because the States were "in active concert or participation with" the Texas attorney general. Plaintiffs' Motion for a Temporary Restraining Order 1-2, 3-4 (Jan. 23, 1989); Memorandum in Support of Plaintiffs' Motion for a Temporary Restraining Order 2 n.2 (Jan. 23, 1989). (Indeed, after the district court clarified that the preliminary injunction applied only to Texas, respondents again sought to have the other 33 States enjoined under Fed. R. Civ. P. 65(d) on the ground that they were acting "in concert" with Texas. Plaintiffs' Memorandum in Support Of Motion to Broaden Injunction [etc.] 21-25 (Mar. 18, 1989).) Respondents thus clearly believed that the 33 States were acting "in concert" with Texas and sought to have the States enjoined for that reason. Since the allegations of concerted activity clearly involved States that were members of the NAAG, the Motion filed by the 33 States and their appearance at the hearing on the TRO were prudent steps to take to try to avoid being enjoined before respondents sought to make them parties.

not support the court of appeals' conclusion that the 33 States waived their objection to personal jurisdiction. Not only does the Motion state that it is submitted "without admitting that this Court has personal jurisdiction [over the 33 States]," it goes on to state that the TRO should be denied because the TRO "could affect the sovereign rights of states which have neither been served nor named as defendants." App. D, *infra*, 65a, 66a. The States did not become "plaintiffs" by opposing the TRO; at most, they raised a defense. Treating their opposition to the TRO request as a demand for "affirmative" relief deprives that term of meaning. In any event, Rule 12(b), Fed. R. Civ. P., states that "[n]o defense or objection is waived by being joined with one or more other defenses in a responsive pleading or motion." Thus, even if the 33 States' Motion could be said to have addressed both the merits of respondents' claims and personal jurisdiction, Rule 12(b) specifically authorizes that procedure.[15]

[15] Some courts have held that the adoption of Rule 12 modified the "affirmative relief" doctrine, so that a party defendant not only may assert any defense without waiving an objection to personal jurisdiction, but also may assert a compulsory counterclaim. See *Neifeld* v. *Steinberg*, 438 F.2d 423, 430 n.13 (3d Cir. 1971) (collecting cases); 5 C. Wright & A. Miller, *supra*, § 1397, at 791-792 (endorsing this practice). Indeed, the Fifth Circuit, among other courts, previously had ruled that a defendant may also assert a *permissive* counterclaim without waiving his objection to personal jurisdiction. *Bayou Steel Corp.* v. *M/V Amsteldvoorn*, 809 F.2d 1147, 1149 (5th Cir. 1987) (collecting cases); *Gates Learjet Corp.* v. *Jensen*, 743 F.2d 1325, 1330 n.1 (9th Cir. 1984) ("If we were to find a waiver when a defendant files a permissive counterclaim in the same pleading in which he asserts jurisdictional defenses, the purposes behind Rule 12(b)—to avoid the delay caused by successive motions and pleadings and to reverse the prior practice of asserting jurisdictional defenses by 'special appearances'—would be thwarted."), cert. denied, 471 U.S. 1066 (1985). (Earlier cases

The court of appeals readily acknowledged that "[a] party may appear generally and yet object to personal jurisdiction at any time before the answer is filed or in the answer." Pet. App. 42a. Nevertheless, the court held that the States could not take advantage of that rule because they were not parties to this case when they opposed the TRO. *Ibid.* But there is no basis for applying the Rule 12(h)(1) forfeiture rule more strictly to an intervenor than to a party named in the complaint. 7C C. Wright, A. Miller, & M. Kane, *supra*, § 1920, at 488 & n.7 ("Unless conditions have been imposed, the intervenor is treated as if he were an original party and has equal standing with the original parties."). Thus if, as the court of appeals determined, the 33 States became "*de facto* intervenors" by filing the Motion opposing the TRO, then they were entitled to the same treatment as parties, who under Rule 12 may combine defenses to the merits and objections to jurisdiction in one pleading. If, on the other hand, the States did not become parties by filing the Motion, then they cannot be subjected to the district court's injunction. In either case, there is no basis for the Fifth Circuit's ruling that the 33 States waived their objection to personal jurisdiction simply by filing the Motion. The judgment below is therefore in error on this point.

c. We recognize that the ruling below turns on the facts of this case and that the factual situation in this case is unusual, which ordinarily would mean that the Fifth Circuit's error would not warrant correction by this Court. On the other hand, the consequences of that error are severe: The court of appeals has allowed a single federal district court judge to enjoin 33 States from

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finding a waiver in the case of permissive but not compulsory counterclaims are collected in *Neifeld*, 438 F.2d at 430 n.13.) If a defendant may assert a compulsory or permissive counterclaim without waiving his objection to personal jurisdiction, it follows that the purely defensive presentation made by the 33 States here cannot constitute a waiver.

enforcing their laws without first having considered the States' objection to the district court's personal jurisdiction, simply because those States sought to avoid having a TRO entered against them in an action where they were not named in or served with the complaint. The upshot is that 33 States have been denied the opportunity to litigate the merits of the preemption issue in their respective circuits or state courts in the context of their own laws, and this Court has been denied the perspective that such litigation could afford. Cf. *United States* v. *Mendoza*, 464 U.S. 154, 160 (1984). Correcting the court of appeals' error will undo these injuries and will allow this Court to obtain the benefit of the views of the other courts on the preemption issue before this Court considers whether it needs to resolve that question.[16]

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[16] If the Court were instead to decide to give plenary review to the judgment below, the Court should grant the petition in No. 90-1604 (the Texas petition) and hold the petition in No. 90-1606 (the 33 States' petition). The petition in No. 90-1604 presents the preemption question that is also presented in No. 90-1606, but the petition in No. 90-1604 does not present the jurisdiction and waiver that are raised by the 33 States' petition. A decision by this Court on the preemption issue could render moot the other issues presented in No. 90-1606.

CONCLUSION

The petition for a writ of certiorari in No. 90-1604 should be denied. The petition for a writ of certiorari in No. 90-1606 should be granted limited to Question 2, and the judgment below should be summarily reversed. In all other respects the petition in No. 90-1606 should be denied.

Respectfully submitted.

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OCTOBER 1991

* The Solicitor General is disqualified in these cases.

APPENDIX A

STATUTORY PROVISIONS AND RULE INVOLVED

1. Section 105(a)(1) of the Airline Deregulation Act of 1978, 49 U.S.C. App. 1305(a)(1), provides as follows:

> (a) Preemption
>
> (1) Except as provided in paragraph (2) of this subsection, no State or political subdivision thereof and no interstate agency or other political agency of two or more States shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier having authority under subchapter IV of this chapter to provide interstate air transportation.

2. Rule 12 of the Federal Rules of Civil Procedure provides in part as follows:

> Defenses and Objections—When and How Presented—By Pleading or Motion for Judgment on the Pleadings
>
> (a) When Presented. A defendant shall serve an answer within 30 days after the service of the summons and compiaint upon that defendant, except when service is made under Rule 4(e) and a different time is prescribed in the order of court under the statute of the United States or in the statute or rule of court of the state. A party served with a pleading stating a cross-claim against that party shall serve an answer thereto

within 20 days after the service upon that party. The plaintiff shall serve a reply to a counterclaim in the answer within 20 days after service of the answer, or, if a reply is ordered by the court, within 20 days after service of the order, unless the order otherwise directs. The United States or an officer or agency thereof shall serve an answer to the complaint or to a cross-claim, or a reply to a counterclaim, within 60 days after the service upon the United States attorney of the pleading in which the claim is asserted. The service of a motion permitted under this rule alters these periods of time as follows, unless a different time is fixed by order of the court: (1) if the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be served within 10 days after notice of the court's action; (2) if the court grants a motion for a more definite statement the responsive pleading shall be served within 20 days after the service of the more definite statement.

(b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19. A

motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, the adverse party may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

* * * *

(h) Waiver or Preservation of Certain Defenses.

(1) A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, or insufficiency of service of process is waived (A) if omitted from a motion in the circumstances described in subdivision (g), or (B) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15(a) to be made as a matter of course.

(2) A defense of failure to state a claim upon which relief can be granted, a defense of failure to join a party indispensable under Rule 19, and an objection of failure to state a legal defense to

a claim may be made in any pleading permitted or ordered under Rule 7(a), or by motion for judgment on the pleadings, or at the trial on the merits.

(3) Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.

APPENDIX B

Submitted by: Consumer Protection Committee

NATIONAL ASSOCIATION OF ATTORNEYS GENERAL

Adopted
Winter Meeting 1987

Modified
Spring Meeting

March 13-15, 1988
Washington, D.C.

III

RESOLUTION

ADOPTING THE AIR TRAVEL INDUSTRY ENFORCEMENT GUIDELINES

WHEREAS, the Attorneys General, as the chief law officers of their states, are the primary enforcers of the states' consumer protection laws; and

WHEREAS, pursuant to their authority under state and common law, the state Attorneys General have jurisdiction to enforce the consumer protection laws as to unfair or deceptive practices by members of the air travel industry, and have done so; and

WHEREAS, all advertisements by airlines, including fare advertisements, are subject to the same standards as any other provider of goods or services and must be nondeceptive and in plain language; and

WHEREAS, in response to an increase in consumer complaints involving the air travel industry,

the National Association of Attorneys General, in June 1987, directed the Consumer Protection Committee to designate a task force of states to study the air travel industry and determine the extent and nature of practices that were allegedly unfair or deceptive and further directed the task force to present its findings along with any recommended course of action to the Attorneys General at the NAAG 1987 winter meeting; and

WHEREAS, the task force undertook an in-depth inquiry into prevalent practices in the air travel industry to determine the nature of such practices and to determine whether they constituted unfair or deceptive practices; and

WHEREAS, the inquiry by the task force resulted in the determination that a number of practices prevalent in the air travel industry were potentially unfair or deceptive; and

WHEREAS, a number of states are presently investigating misleading advertising in the air travel industry and have therefore withheld the filing of actions until guidelines have been adopted; and

WHEREAS, the task force has recommended that the best means of correcting such practices that constitute unfair or deceptive practices in the air travel industry is through the adherence by the air travel industry to uniform guidelines dealing with fare advertising, frequent flier programs and the disclosure of policies on compensation for voluntary denied boarding; ———

NOW, THEREFORE, BE IT RESOLVED THAT THE NATIONAL ASSOCIATION OF ATTORNEYS GENERAL:

1) Adopt the Air Travel Industry Enforcement Guidelines as a statement of the general enforcement policy of the Attorneys General with respect to unfair or deceptive acts or practices in the airline industry, subject to the exercise of their individual prosecutorial discretion, and variations or supplementations to allow for variations in precedents among the federal circuits and differences in individual state or common law, and determines that in order to have an orderly process of implementation the guidelines take effect January 15, 1988, except and provided that this does not require that airlines make any required changes in frequent flyer program brochures prior to April 15, 1988; and

2) The task force on the air travel industry is instructed to receive and examine any comments from the industry, consumer groups, federal agencies, and other interested parties, evaluate any such comments, and report to NAAG at its spring 1988 meeting on the advisability of any modifications of the guidelines; and

3) That the Executive Director and General Counsel is authorized to make the Air Travel Enforcement Guidelines available to appropriate members of the Administration, Congress, and other interested individuals and associations.

The following Attorneys General dissent:

David Wilkinson, Utah; Hal Stratton, New Mexico

Action: March 15, 1988

1. The Staff Comments of March 8, 1988, developed in accordance with Section 2 of this Resolution, are adopted and are to be incorporated into the Guidelines and Commentary.

2. Chair of the Consumer Protection Committee, Attorney General William L. Webster, is authorized to appoint a task force of four Attorneys General to continue to evaluate the effectiveness of the Guidelines and to continue discussions with members of the industry and other interested parties.

Abstensions:

Attorney General David L. Wilkinson, Utah

NATIONAL ASSOCIATION OF
ATTORNEY GENERAL

TASK FORCE
ON THE
AIR TRAVEL INDUSTRY

GUIDELINES
AND
COMMENTARY

APRIL 1988

National Association of Attorneys General
Task Force on the Air Travel Industry
Revised Guidelines

INTRODUCTION

In June, 1987, the National Association of Attorneys General ("NAAG") directed the appointment of a Task Force of states to study the advertising and marketing practices of the airline industry in the United States. In addition to the study, the Task Force was directed to determine the nature and extent of existing unfair and deceptive airline advertising practices and to report a recommended course of action to NAAG at its meeting in December 1987.

The Task Force Report and Recommendations were adopted by NAAG at its winter meeting on December 12, 1987, with a continuing direction to the Task Force (1) to receive and examine any comments from industry, consumer groups, federal agencies, and other interested parties; (2) to evaluate these comments; and (3) to report to NAAG at its Spring 1988 meeting on the advisability of any modifications of the Guidelines.

The Task Force received written comments from the Air Transport Association, the American Association of Advertising Agencies, American Airlines, the Association of National Advertisers, the Council of Better Business Bureaus, the Federal Trade Commission, the National Association of Broadcasters, Southwest Airlines, United Airlines, USAir, and the U.S. Department of Transportation. Assistant attorneys general of the Task Force states evaluated these comments, and reported their recommendations to NAAG.

On March 15, 1988, NAAG adopted the recommended changes to the frequent flyer Guidelines and directed that the comments to both the fare advertising and frequent flyer Guidelines be changed to respond to valid concerns raised by those filing comments. The Guidelines and comments herein reflect the changes directed by NAAG.

NAAG also directed the chair of NAAG's Consumer Protection Committee to appoint four attorneys general to serve on a continuing task force to evaluate the effectiveness of the Guidelines and to continue discussions with members of the industry and other interested parties. These attorneys general are: John Van de Kamp (California), Neil F. Hartigan (Illinois), Jim Mattox (Texas), and Kenneth O. Eikenberry (Washington).

It is important to note that these Guidelines do not create any new laws or regulations regarding the advertising practices or other business practices of the airline industry. They merely explain in detail how existing state laws apply to air fare advertising and frequent flyer programs. Each Guideline is followed by a comment which summarizes:

- NAAG's intent with respect to that Guideline.
- Any relevant comments received by the Task Force.
- Any significant changes that were made to the Guidelines.

Section 1—Definitions

1.0 Advertisement means any oral, written, graphic or pictorial statement made in the course of solicitation of business. Advertisement includes, without limitation, any statement or representation made

in a newspaper, magazine or other public publication, or contained in any notice, sign, billboard, poster, display, circular, pamphlet, or letter (collectively called "print advertisements"), or on radio or television ("broadcast commercials").

Comment: This definition encompasses those materials and media covered by most states' false advertising statutes. "Print advertisements" and "broadcast commercial" are separated into different categories because they are afforded slightly different treatment under these Guidelines. This represents a change from an earlier draft of the Guidelines and is an attempt to address some of the airlines' concerns regarding the difficulties of lengthy disclosures in broadcast commercials.

1.1 Award means any coupon, certificate, voucher, benefit or tangible thing which is promised, given, sold or otherwise transferred by an airline or program partner to a program member in exchange for mileage, credits, bonuses, segments or other units of value credited to a consumer as an incentive to fly on any airline or to do business with any program partner.

Comment: This definition, as well as definitions 1.2, 1.3, 1.4, 1.6, 1.9, and 1.10, is self-explanatory.

1.2 Award level means a specified amount of mileage or number of credits, bonuses, segments or other units which a program member must accumulate in order to receive an award.

1.3 Blackout date means any date on which travel or use of other program benefits is not permitted for program members seeking to redeem their award levels. This is a form of capacity control.

1.4 Capacity control means the practice by which an airline or program partner restricts or otherwise limits the opportunity of program members to redeem their award levels for travel or other benefits offered in the program.

1.5 Clear and conspicuous means that the statement, representation or term ("statement") being disclosed is of such size, color contrast, and audibility and is so presented as to be readily noticed and understood by the person to whom it is being disclosed. All language and terms should be used in accordance with their common or ordinary usage and meaning. For example, "companion" should be used only when it means any companion (*i.e.*, any person traveling with the program member), not solely family members. Without limiting the requirements of the preceding sentences:

(a) A statement in a print advertisement is considered clear and conspicuous if a type size is used which is at least one-third the size of the largest type size used in the advertising. However, it need not be larger than:

- 10-point type in advertisements that are 200 square inches or smaller, and
- 12-point type in advertisements that are larger than 200 square inches.

If the statement is in the body copy of the advertisement, it may be in the same size type as the largest type used in the body copy, and does not have to meet these type-size requirements.

(b) A statement in a broadcast commercial is considered clear and conspicuous if it is

made orally and is as clear and understandable in pace and volume as the fare information.

(c) A statement on any billboard is considered clear and conspicuous if a type is used which is at least one-third the size of the largest one size used on the billboard.

(d) A statement required by Section 3, relating to frequent flyer programs, is considered clear and conspicuous if it is prominently located directly adjacent to the materials to which it applies. Type size should be no smaller than the most commonly-used print size in the document, but in no event smaller than 10-point type. Any reservation of any right to make future changes in the program or award levels should be located prominently at the beginning of printed materials.

Comment: One of the most deceptive aspects of current air fare advertisements is the completely inadequate manner in which those advertisements disclose the restrictions and limitations which apply to the advertised fares. The restrictions disclosed in print advertisements are rarely located near the fare advertised and often appear only in extremely small type at the bottom of the advertisement. In broadcast commercials, such disclosures are generally absent from radio advertisements, and if included at all in television commercials appear as written disclosures flashed on the screen much too quickly for the average person to read. On billboards any mention of restrictions on advertised fares is unusual.

Given this background, NAAG believes that it is necessary to define clearly for the airlines what con-

stitutes clear and adequate disclosure in all advertising media. The type-size minima for print advertisements are aimed at making the disclosures both easy to read and noticeable. Consequently, a slightly larger size print is suggested in larger size advertisements. These type-size minima are not absolute. That is, print disclosures do not in every instance have to be in at least 10-point type, as long as they are clear and conspicuous regardless of the size of the type. The type size suggestions are merely examples of advertising practices which give an airline a reasonable expectation that it will not be sued if it follows the Guidelines. In the Task Force's meetings with the airlines last summer, one common note expressed was that the airlines could abide by disclosure guidelines, as long as they were clear and enforced uniformly. If an airline does not choose this safe harbor and instead ventures into untested waters, it may run aground and it may not. But it is free to do so.

The comments to this Guideline were critical largely because NAAG singled out airline advertisements for this treatment. However, on the whole, the airlines indicated they could meet the type size standard relatively easily in print advertisements.

NAAG elected to encourage oral disclosures in broadcast media, because written disclosures are difficult if not impossible to read and because many people listen to, rather than watch television commercials. We continue to believe that oral disclosure is the best method of conveying information in a television commercial. However, the converse of this Guideline is not true—a disclosure in a television commercial is not necessarily deceptive if it is instead made in a video super or crawl, as long as it is still clear and conspicuous.

For safety reasons, very large type is provided for billboards.

1.6 Frequent flyer program means any program offered by an airline or program partner in which awards are offered to program members.

1.7 Limited-time availability means that the fare is only available for a specific period of time or that the fare is not available during certain blackout periods.

Comment: This definition applies to air fares that are only available certain times of the year (e.g., available December 15 through April 15), are not available at certain times at all (not available December 23 through January 5), or are only available until a date cetrain (available only until January 15). It does not apply to fares that are unavailable only on certain days of the week or times of the day.

1.8 Material restriction means a restriction, limitation, or other requirement which affects the use or refundability of a ticket, and which is not generally applicable to all classes of fares or tickets (such as standard conditions of carriage).

Comment: Due to the numerous standard conditions applicable to most airline tickets, NAAG has confined the definition of "material restrictions" to those restrictions and limitations that are specific and unique to certain fare categories (i.e., those that are different from the restrictions and limitations that apply to a standard coach ticket).

1.9 Program member means any consumer who has applied and been accepted for membership in an airline's frequent flyer program, regardless of whether he or she has accrued mileage, credits,

bonuses, segments or other units of value on an airline or with any program partner.

1.10 Program partner means any business entity which provides awards as part of an airline's frequent flyer program.

1.11 Vested member means a member of a frequent fllyer program who is enrolled in an existing program and has provided consideration to the airline or its partners, and who has not received adequate notice of program changes such as set forth in Sections 3.2 and 3.9. For example, consideration includes purchasing tickets on an airline, renting a car or using a specific credit card.

Comment: This definition separates out those consumers who joined a frequent flyer program without receiving adequate notice of how that program could change prospectively. The Guidelines afford some special protections to vested members and vested miles. There is sound reason for this.

After reviewing the travel reward promotional materials for most of the major airlines, NAAG concluded that currently vested members have not received adequate disclosure of the potential for significant increases in award levels or imposition of other restrictions which may result in the airlines' unilateral devaluation of awards. Therefore, the Guidelines treat vested members and the miles which members accrued before receiving adequate notice of prospective changes differently.

1.12 Vested mile means program mileage (or other credits) accumulated by a vested member before that person receives adequate notice of program changes, as set forth in Sections 3.2 and 3.9.

Comment: This definition identifies any mileage or credit accrued by a vested member before he or

she received adequate notice regarding the possibility of future detrimental changes in the program. See the comments to the definition of vested member.

Section 2—Fare Advertisements

2.0 General guideline

Any advertisement which provides air fares or other price information must be in plain language, clear and conspicuous, and non-deceptive. Deception may result not only from a direct statement in the advertisement and from reasonable inferences therefrom, but also from omitting or obscuring a material restriction.

Comment: This Guideline and the following Guidelines restate individual states' false advertising and deceptive practices statutes as they apply to air fare and price advertising.

2.1 Disclosure in print advertisements

Print advertisements for fares must make clear and conspicuous disclosure of restrictions such as:

- Limited-time availability.
- Limitations on right to refund or exchange of ticket.
- Time of day or day of week restrictions.
- Length of stay requirements.
- Advance purchase requirements.
- Round trip purchase requirements.
- Variations in fares to or from two or more airports serving the same metropolitan area.

- Limitations on, or extra charges for, breaks or changes in itinerary, such as failure to travel on every leg as scheduled.
- The statement, if any, required by Guideline 2.4.
- Any other material restriction on the fare.

This Guideline would be met by disclosing material restrictions either:

- in the body copy of the advertisement,
- adjacent to the fare price, or
- in a box with a heading such as "Restrictions."

Examples (in 10-point type) of disclosures of material restrictions if they apply to fares being advertised are:

In the body copy:

RESTRICTIONS. "Weekend traveler" fares are generally available all day Saturday and Sunday until 6 p.m. However, these fares are not available on some flights on some days.

In the box:

Restrictions These restrictions apply to one or more of these fares: • 30 day advance purchases required • Not available November 20-December 1 • New York fares only to Newark Airport

or

Restrictions. Advertised fares are only available Tuesday, Wednesday, and Thursday afternoons. Three-day advance purchases required. 50% cancellation penalty applies.

Comment: The advantage to consumers of print advertisements over television or radio advertisements is that they give consumers something tangible to use as a reference when shopping for low cost air fares. Because consumers can take their time and carefully read a print advertisement it is especially important that this type of advertisement contain the most accurate and complete information possible regarding any advertised air fares. The restrictions singled out by NAAG in this Guideline for disclosure are those NAAG believes are the most significant to a consumer contemplating purchasing a ticket. An advertisement that complies with this Guideline will give a consumer three crucial pieces of information:

1. Eligibility—consumers will know if they are eligible for the fare (i.e., can a consumer meet advance purchase requirements or other restrictions affecting time or date of travel?);

2. Availability—consumers can accurately gauge the likelihood that they will be able to obtain a ticket at the advertised price; and

3. Risk—consumers will know the risks associated with purchasing a ticket at the advertised price (i.e., is the ticket non-refundable or do other penalties apply upon cancellation or changes in itinerary?).

This particular Guideline received a great deal of negative comment because the airlines and goverment agencies misunderstood it to mean that it required full disclosure of all of the restrictions that apply to each specific flight. This is not correct. The Guideline only requires that if any of the restrictions listed in the Guideline apply to any of the air fares

advertised then the advertisement must disclose the existence of that restriction and the fact that the restriction applies to one or more of the air fares advertised. To clear up this misunderstanding, NAAG included specific examples of the disclosures required by the revised Guidelines. There was also some misunderstanding that disclosure in a box was required. As the Guideline states, this is just one option.

The comments made to the December Guidelines evidenced another misconception about the wording of the disclosures on fare restrictions. This Guideline provides suggested wording, again to assist the airlines in determining how to meet the disclosures, but the language is by no means sacrosanct. The best creative minds in the advertising business are available to the airlines through their advertising agencies. The airlines are free to avail themselves of these talents, who are certainly adept at phrasing a message the advertiser wants to get across to the consumer. The essence of the Guidelines is that consumers must be advised of the limits which the airlines has chosen to impose on consumers' ability to buy tickets at the advertised price.

2.2 Disclosure in broadcast commercials

Broadcast commercials for fares must make clear and conspicuous disclosure of:

- Limited-time availability.
- Limitations on right to refund or exchange of ticket.
- The statement, if any, required by Guideline 2.4.

In addition, if the following seven disclosures are not made in a clear and conspicuous manner in the commercial, any that are applicable must be disclosed orally to the passenger before reservations are actually made:

- Time of day or day of week restrictions.
- Length of stay requirements.
- Advance purchase requirements.
- Round trip purchase requirements.
- Variations in fares to or from two or more airports serving the same metropolitan area.
- Limitations on, or extra charges for, breaks or changes in itinerary, such as failure to travel on every leg as scheduled.
- Any other material restriction in the fare.

As to these seven types of disclosure, the airline may include any or all in the commercial or may choose to defer disclosure until the time reservations are actually made.

If any of these seven disclosures applies to the fare advertised and the airline chooses to defer disclosure until the time the reservations are actually made, the commercial must give clear and conspicuous disclosure that "Other substantial restrictions apply," or similar language. The statement "Restrictions apply" is not sufficient.

Comment: In an earlier draft, the Guidelines required that radio and television advertisements include all the same disclosures required in print advertisements. The airline industry unanimously responded that such detailed disclosures would be impossible to include in the 15 and 30 second advertising spots generally purchased for radio and television ads, and argued that, even if time allowed this much oral disclosure, the resulting commercial would provide too much information for a consumer to absorb usefully. They concluded that such a requirement would eliminate airline price advertising on television and radio.

The provision of fare information, without stating the most significant restrictions that apply to the fare advertised, is deceptive and ultimately harmful to consumers and the airline industry alike.

The Guideline as revised provides a compromise. It suggests disclosure of the three most serious restrictions that can apply to an airline ticket—limited time availability, nonrefundability or exchangeability and limitations on fare availability. Disclosure of all of these restrictions can be accomplished by something as simple as the following statement: "Tickets are nonrefundable, are not available on all flights, and must be purchased by December 15. Other significant restrictions apply." These 20 words can easily be read in a 30 second commercial. In addition, some or all of this information may be clearly and conspicuously disclosed in a video super or crawl in television commercials. Of course, this option is not available for radio commercials. However, commenting airlines confirmed that the typical radio spot is 60 seconds, making the concern about time less crucial.

Airlines then have the option of disclosing any additional material restrictions in the advertisement itself or deferring such disclosure until a consumer makes a reservation. Of course, if an airline does not choose to restrict its fare severely, fewer words (and thus, less air time) is needed.

This compromise position also recognizes that print advertising lends itself more readily to detailed infor-

mation in a form which the consumer can retain and refer to at his own pace. For this reason, NAAG has chosen to require less disclosure in broadcast, allowing print to be the medium for full disclosure.

2.3 Disclosure on billboards

Any billboard which provides air fare or other price information on a fare to which any material restrictions apply must have clear and conspicuous language such as "Substantial restrictions apply." The statement "Restriction apply" is not sufficient.

Comment: For safety reasons, NAAG concluded that lengthy written disclosures on billboards are inappropriate and potentially hazardous to drivers. We disagree with the DOT that this special treatment of price advertising on billboards will result in a proliferation of billboards on our nation's highways.

2.4 Fare availability

Any advertised fare must be available in sufficient quantity so as to meet reasonably foreseeable demand on every flight each day for the market in which the advertisement appears, beginning on the day on which the advertisement appears and continuing for at least three days after the advertisement terminates.

However, if the advertised fare is not thus available, the advertisement must contain a clear and conspicuous statement of the extent of unavailability of the advertised fare.

Statements such as "Sears limited" and "Restrictions apply" do not meet this Guideline. These examples do meet this Guideline:

- This fare may not be available when you call.
- This fare is not available on all flights.

- This fare is only available on some Saturday and Sunday flights.

Comment: This Guideline elicited the greatest amount of negative comments from the airline industry, the ATA, FTC and the DOT. They argue that this Guideline is impossible to implements because, due to the complexity of airline pricing systems, the number of seats available at a particular low fare on a particular flight is not a fixed number. It is continuously modified up to the point of departure. They suggest that it is acceptable for the airlines to communicate a general invitation to the public to buy low fare seats, but then reduce the number of seats available to zero or close to zero for the most popular flights, because the possibility that a consumer can purchase a seat at the advertised price exists at the time the advertisement is placed.

The complexity of the airlines' system cannot justify the unfairness of such an approach. No other retailer would be allowed to justify a failure to stock an advertised item on the grounds that, at the last minute the retailer decided it was less costly not to stock the item it had just advertised. The availability of an item advertised, at the price advertised, goes to the very heart of truthful advertising. If an airline advertises an air fare that is not available on each and every flight to the destination advertised, and this fact is not disclosed, then the advertisement is deceptive on its face.

While NAAG appreciates the difficulty of disclosing the specific number of seats available on each flight advertised, a disclosure that "This fare is not available on all flights" or "This fare may not be available when you call" is not particularly onerous. Absent such disclosure, airlines, as all other retailers, should

be required to have sufficient stock available to meet reasonable demand for any fare advertised.

2.5 Surcharges

Any fuel, tax, or other surcharge to a fare must be included in the total advertised price of the fare.

Comment: Recently, several airlines considered the possibility of passing along an increase in the cost of fuel to consumers by imposing a "fuel surcharge" rather than simply raising air fares to reflect their increased costs. The air fare advertised was to remain the same, but a footnote would be added to the advertisement in the "mice type" disclosing that, for instance, a $16 fuel surcharge would be tacked on to the advertised fare. The potential for abuse, if this type of price advertising is permitted, is obvious. It would only be a matter of time before $19 air fares from New York to California could be advertised with $300 meal, fuel, labor, and baggage surcharges added in a footnote. The total advertised price of the fare must include all such charges in order to avoid these potential abuses. However, this Guideline should not be construed to require an airline to do the impossible. We do not believe that such minimal tour-related charges fall within the meaning of "fare" and therefore do not believe that unknown charges must be disclosed as a surcharge (if the amounts is not in fact known). This of course does not mean that charges which are known —either as an exact amount or as a percentage—do not have to be disclosed in advertisements.

2.6 Round trip fare advertising

If an airline elects to advertise the one-way portion of a fare that is only available as a round-trip purchase, this restriction, together with the full round-trip fare, must be advertised in a clear and conspicuous manner, at least as prominently as the one-way fare.

Comment: Airlines routinely advertise one-half of the price (i.e., the alleged "one-way" price) for tickets that are only available if a consumer makes a round-trip purchase. Under this Guideline, if an airline elects to continue this advertising practice, it must also disclose that the fare is only available if a consumer purchases a round trip ticket and the actual price of the full round trip ticket. The disclosure must be made in a type size and location as prominent as the fare advertised.

The airlines have, for the most part, stated a willingness to advertise the full round trip air fare if all of the airlines do the same. This Guideline is intended to encourage all airlines to adopt this practice.

2.7 Deceptive use of "sale," "discount," "reduced," or similar terms

A fare may be advertised by use of the words "sale," "discount," "reduced," or other such words that suggest that the fare advertised is a temporarily reduced fare and is not a regularly-available fare only if that fare is:

- available only for a specified, limited period of time, and
- substantially below the usual price for the same fare with the same restrictions.

Comment: The majority of airline tickets sold each year sell at prices significantly lower than the full "Y" or standard regular coach fare. These lower fares are offered year round and airlines in theory

allocate a certain amount of seats to each fare "bucket." As a result, the regular coach fare has ceased to have any meaning as a starting point for determining whether or not a ticket is being offered for a "sale" price as consumers have come to understand that term.

In this Guideline NAAG has attempted to prevent consumer confusion by limiting the use of such words as "sale," "discount," or "reduced," to describe only those fares that represent a true savings over regularly available air fares—those that are available only for short periods of time and are substantially below any regularly offered fare for a ticket carrying identical restrictions.

SECTION 3—Frequent Flyer Programs

General Comments to Section 3

Frequent flyer programs have been widely acknowledged as the most successful marketing programs in airline industry history. The bargain struck between customers and the airlines has proven to be very costly to many of the airlines. Customers who have accrued the necessary mileage are expecting to collect the awards which led them to join and fly in the programs in the first place. Some airlines are now disturbed by the cost of keeping their side of the bargain and the real possibility that they may lose revenue because passengers flying on frequent flyer awards may begin displacing paying customers. The solution contemplated by some carriers has been to raise award thresholds and implement restrictions to decrease the cost to them of the award program. The effect of these actual and/or potential changes is to significantly devalue vested members' accrued mileage or other credits in the program. Although various frequent flyer program awards materials have contained some obscure mention of the possibility of future program changes, these disclosures have been wholly inadequate to inform program members of the potentially major negative changes which are contemplated by many airlines.

These Guidelines cover frequent flyer programs including any partner airlines or other providers of goods or services such as rental cars and hotel rooms. They are intended to protect those consumers who have participated in these programs in good faith, without adequate notice that the programs could change, and to advise the airlines of how they can reserve this right in the future by adequately providing this information to all members in a non-deceptive manner consistent with state law.

3.0 Capacity controls

1. If an airline or its program partners employ capacity controls, the airline must clearly and conspicuously disclose in its frequent flyer program solicitations, newsletters, rules and other bulletins the specific techniques used by the airline or program partner to control capacity in any solicitation which states a specific award. This includes blackout dates, limits on percentage of seats (for example, "the number of seats on any flight allocated to award recipients is limited"), maximum number of seats or rooms allocated or any other mechanism whereby the airline or program partner limits the opportunities of program members redeeming frequent flyer award levels. To meet this Guideline, all blackout dates must be specifically disclosed.

2. As to awards for vested miles, the airline or program partner must provide the award to the

vested member without capacity controls or provide the award with capacity controls within a reasonable period of time. A reasonable period would be within 15 days before or after the date originally requested. If all seats within this 31-day period were sold at the time the vested member requested a reservation, so that the member could not be accommodated without displacing a passenger to whom a seat has been sold, then a reasonable period would be the period to the first available date on which every seat was not sold to the requested destination at the time the program member requests a reservation.

Comment: All of the airlines that met with the Task Force stated that they intended to retain the right to impose capacity controls, in the future, to limit the number of seats available to consumers purchasing tickets with frequent flyer award certificates. The imposition of capacity controls, including blackout dates, has the potential for unreasonably restricting the supply of seats or other benefits in such a way as to significantly devalue the awards due vested program members. NAAG found that this potential limitation has not been adequately disclosed to program members in the frequent flyer promotional materials we reviewed. This Guideline puts the airlines on notice as to what information they should provide to consumers if they want to impose capacity controls on the use of frequent flyer awards at some future date.

In earlier drafts of the Guidelines the Task Force took the position that capacity controls could not be applied to awards based on any mileage or credits accrued by vested members before they received adequate notice that capacity controls could be imposed. However, as a compromise, and to permit the airlines

reasonable flexibility around holiday or other peak travel times, the revised Guideline provides for a reasonable time to accommodate passengers with award tickets: a 31-day "time window"—15 days before and 15 days after the date requested for ticketing. This "time window" allows the airlines to allocate capacity to meet demand over a reasonable, yet defined period of time. In the event all flights to a certain destination are sold out during the entire 31-day time window, ticketing on the next available seat would be reasonable. This approach has the additional benefit of being simple and straightforward to implement with less possibility of customer confusion and frustration.

3.1 Program changes affecting vested members

1. Any airline or program partner that has not reserved the right to make future changes in the manner required by Sections 3.2 and 3.9 of these Guidelines and that changes any aspect of its program (for example, imposition of capacity controls, increases in award levels, or any other mechanism whereby a vested member's ability to redeem any award will be adversely affected) must protect vested program members. Examples which meet this Guideline are:

(a) All vested members may not be adversely affected by that change for a reasonable period would be one year following mailing of notice of that change.

(b) The airline or program partner may allow vested members to lock in any award level which is in effect immediately preceding any change in the program. That award level

would be guaranteed for a period of one year after mailing notice of any increase in award levels. A vested member would also be permitted to change his or her selection to lock in a different award in existence at any time prior to an increase in award levels.

(c) The airline or program partner may credit vested program members with miles or other units sufficient to assume that, at the time of any change in the program, the member will be able to claim the same awards he or she could have claimed under the old program.

Comment: This Guideline institutes corrective measures to protect vested members and the mileage they accrued before receiving adequate notice that a program could change to their detriment at some point in the future. The Guideline sets forth three acceptable alternative approaches to allow airlines to change existing programs without unreasonably altering the rights and expectations of vested members. For example, an airline may wish to create a new program with higher award levels for persons who join in the future. Guideline 3.1.1(a) grandfathers in vested members for a one-year period after notice. Guideline 3.1.1(b) grandfathers only a specified locked-in award for a one-year period after the effective date of the change and thereby gives the member an additional year to accrue mileage or units toward a specific award. Guideline 3.1.1(c) allows the program to avoid the administrative problems of distinguishing between old and new members and old and new award levels by equitably adjusting the award levels of the vested members.

These examples are not the only ways in which airlines can reasonably protect vested members when changing existing programs. They are intended to delineate minimum acceptable standards.

3.2 Notice of Changes

1. Adequate notice of changes in current frequent flyer program award levels must be provided to vested program members by the airline or program partner to allow a reasonable time for the vested member to obtain and use an award. For example, a notice no less than one year prior to the effective date of such change would be reasonable. Reduction in award levels would not require such notice.

2. Any airline which has a policy of deleting program members from its mailing list for notices and statements must clearly and conspicuously disclose that policy in plain language in its rules and regulations.

3. To reserve the right to make future changes in the award levels and program conditions or restrictions in a manner providing reasonable notice consistent with state law, which notice is less than the notice set forth in Guideline 3.2.1, an airline must first clearly and conspicuously disclose that reservation and the nature of such future changes, in plain language. This disclosure should include examples which make clear the outer limits within which program awards may be changed. For example, the following is not adequate disclosure:

> "Program rules, regulations and mileage levels are subject to change without notice."

This example is adequate disclosure:

> "(Airline) reserves the right to terminate the program with six months notice. This means that regardless of the amount you participate in

this program, your right to accumulate mileage and claim awards can be terminated six months after we give you notice."

Or:

"(Airline) reserves the right to change the program rules, regulations, and mileage level. This means that (Airline) may raise mileage levels, add an unlimited number of blackout days, or limit the number of seats available to any or all destinations with notice. Program members may not be able to use awards to certain destinations, or may not be able to obtain certain types of awards such as cruises."

Or, if the airline so intends, the disclosure might also say:

"In any case, (Airline) will make award travel available within — days of a program member's requested date, except for blackout dates listed here."

The airline's right to make future changes, in a manner other than that provided in Guideline 3.1, shall apply only to mileage accrued after members receive the notice required by this Guideline.

Comment: In the past, airlines have attempted to reserve the right to make radical future changes in their programs by using such vague and uncertain blanket language as "Subject to additions, deletions, or revisions at any time." The consumer outrage that ensued when several of the major airlines attempted unilaterally to change their programs in the winter of 1986-87 makes it clear that consumers were not adequately told, when they joined and participated in frequent flyer programs, that they were taking a

gamble that the award they were striving for would still be available, at the mileage level originally advertised by the time they accrued the necessary miles. To avoid a recurrence of this same problem in the future, this Guideline provides that the potential for such extensive program changes must be clearly and conspicuously disclosed to the public by specific example. It also puts the airlines on notice that (1) their previous attempts to disclose this critical information have been inadequate, (2) if they intend to reserve the right to make such changes in the future, they must give members new and different notice, and (3) as to vested members, airlines cannot implement any adverse changes until one year after notice is given. One year is deemed reasonable because many consumers can only travel during particular periods of the year due to work or family constraints, and therefore notice of less than a year may impact unduly harshly on a particular class of program members.

If an airline wants to reserve the rights to change the terms of its program without giving its members one year's notice (1) it can do so only after clear and adequate notice has been given to the program members and (2) this reduced standard can apply only to mileage accrued after clear and adequate notice has been given.

NAAG discovered that many airlines delete program members from their mailing lists if they are determined to be "inactive." Inactive is defined differently by each airline, but generally includes some formula requiring active participation in the program within a six to ten month period prior to any given mailing. Because crucial information regarding changes is included in program mailings, the

Guidelines require that any airline with a policy of deleting program members from its mailing list clearly and conspicuously disclose that policy in the rules and regulations distributed to all program members when they join.

3.3 Fare or passenger class limitations

Any limitation upon the type or class of fare with which an upgrade certificate, discount flight coupon, or free companion coupon may be used must be clearly and conspicuously disclosed before the program member claims the award. Disclosure of the fare by airline terminology (for example, "Y Class") is not deemed sufficient.

Comment: Many airlines are encouraging consumers to use their accrued mileage or credits to obtain upgrade certificates or free campaign coupons, rather than free tickets because this is more cost effective for the airlines. Many of these coupons and certificates can be used only in conjunction with a regular coach fare ticket. Because of the high cost of a full coach ticket (often disclosed only as "Y Class") many of these coupons and certificates represent no real savings and therefore are useless to consumers. This Guideline requires that any such restriction be clearly disclosed to consumers before the award is claimed.

3.4 Certificates issued for vested miles

Certificates, coupons, vouchers, or tickets issued by an airline for awards redeemed for vested miles must be valid for a reasonable period of time. One year is deemed to be reasonable. Any restrictions on use, redeposit, extension, or re-issuance of certificates must be clearly and conspicuously disclosed on the

certificate and in any rules, regulations, newsletter or other program materials.

Comment: Again, because many consumers may only travel during certain periods of the year, fairness requires that awards be valid for at least a full twelve month cycle.

3.5 Fees

Any airline which charges a fee for enrollment in its frequent flyer program must fully disclose at airline ticket counters and in all advertisements, solicitations or other materials distributed to prospective members prior to enrollment all terms and conditions of the frequent flyer program. Such disclosure must be made prior to accepting payment for enrollment in the airline's program.

Comment: Some airlines have required that consumers fill out a membership application and pay a membership fee before obtaining a copy of the program rules and regulations. Because of the serious restrictions that can apply to a travel reward program, it is essential that all consumers have an opportunity to review all of the program rules and regulations before paying an enrollment fee.

3.6 Redemption time

All airlines must disclose clearly and conspicuously the actual time necessary for processing award redemption requests where such requests are not normally processed promptly. An example of prompt processing would be within 14 days of processing the request. An example of a disclosure would be "processing of awards may take up to 30 days."

Comment: The airlines indicated that full disclosure of redemption time will not be a problem.

3.7 Termination of program affecting vested members

In the event a frequent flyer program is terminated, adequate notice of termination must be sent to all vested members so that vested members have a reasonable time to obtain awards and use them. Adequate notice would be notice at least one year prior to the termination of the program. Award levels in existence prior to such notice should remain in effect for one year. Program members should then have one year to use certificates, coupons, vouchers or tickets. Any applicable capacity controls should be modified as necessary to meet the demand for all award benefits due program members.

Comment: The airlines uniformly take the position that because participation in travel reward programs is "free," an airline should be able to terminate a travel reward program at any time without notice. NAAG strenuously disagrees. Consumers pay significant consideration for the airlines' promise to award them "free tickets" and other awards. Program members fly on a particular airline to accrue mileage in a travel reward program often foregoing a more convenient departure time, a more direct flight, and even a less expensive ticket. Those consumers who kept their part of the bargain have a right to expect the airlines to keep theirs, regardless of the cost. This Guideline affords consumers reasonable protection against unilateral changes. It gives consumers one year to accrue the mileage to reach a desired award level and one year to use the award.

This Guideline is intended to apply to programs that are terminated due to mergers or for any other reason. It would be unconscionable to permit airlines, which have reaped the rewards of these travel incentive programs, to walk away from their obligations to consumers under any circumstances.

3.8 Restrictions

All material restrictions on frequent flyer programs must be clearly and conspicuously disclosed to current program members and to prospective members at the time of enrollment.

Comment: This Guideline is intended as a corrective measure. Any airline that has not clearly and conspicuously disclosed material program restrictions to vested members should do so now. New members are entitled to full disclosure at the time of enrollment.

3.9 Method of disclosure

Disclosures referred to in these Guidelines should be made in frequent flyer program solicitations, newsletters, rules, and other bulletins in a clear and conspicious manner so as to assure that all program members receive adequate notice. As used in these Guidelines, disclosure also refers to information on program partners.

Comment: The brochures containing the rules and regulations for airlines' frequent flyer programs have been as long as 52 pages. Extremely important restrictions are often buried under inappropriate topic headings or hidden on the back of the last inside pages of the brochure. This Guideline requires that restrictions be disclosed in reasonable print size in a location that will be most helpful and informative to consumers.

Any reservation of the right to make future changes in a program is so significant to consumers that it should be disclosed prominently to insure that the

maximum number of people see and read this restriction. The Guideline permits the airlines flexibility to determine when and how often a disclosure must be made so long as the airline discloses the information in a manner which gives meaningful notice to all affected members.

One airline complained that Guideline 3.9 is unreasonable because it proposes that all the restrictions be disclosed at the beginning of the program brochure. In fact, the only disclosure the Guidelines suggested listing at the beginning of a brochure is the reservation of the right to change the program prospectively. The significance of such a restriction —that the terms and conditions of the program can change at any moment—is so critical that potential members should be made aware of it immediately. All other disclosures can be made in the text of the brochure.

Section 4—Compensation for Voluntary Denied Boarding

4.0 Disclosure of policies

If an airline chooses to offer ticketed passengers incentives to surrender their tickets on overbooked flights, the airline must clearly and conspicuously disclose all terms and conditions of the proposal—including any restrictions on offers of future air travel —to the person to whom the offer is made, and in the same manner in which the offer is made, before the person accepts the offer.

Comment: Federal regulations offer specific protections and certain rights to individuals who are involuntarily bumped from a flight. Airlines, however, are free to offer whatever compensation they

want to people who voluntarily give up their seat on an airplane because of overbooking. For economic reasons, airlines prefer to offer vouchers good for free tickets on future flights, instead of cash compensation to these passengers.

While these vouchers may seem very attractive to a consumer who has the flexibility to wait for a later flight, many carry serious restrictions on their use or are subject to lengthy black out periods when they cannot be used.

This Guideline requires that airlines fully disclose any and all restrictions on offers for future air travel, before a consumer agrees to give up his or her seat. It does not, as several airlines and government agencies argued in their responsive comments, set any standards for the type of compensation that airlines must offer to these passengers.

CONCLUSION

Consumer dissatisfaction with the airline industry has reached crisis proportions. Federal agencies have focused their attention on airilne scheduling problems, on-time performance, safety, and other related issues, but have not addressed airline advertising and frequent flyer programs. Unchecked, the airlines have engaged in practices in these areas that are unfair and deceptive under state law. The individual states through NAAG can play an important role in eliminating such practices through these Guidelines.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

C.A. No. A 89 CA 0067

TRANS WORLD AIRLINES, INC.,
CONTINENTAL AIRLINES, INC. AND
BRITISH AIRWAYS PLC, PLAINTIFFS

v.

JIM MATTOX, Attorney General of the
State of Texas, DEFENDANT

[Filed Jan. 25, 1989]

COMPLAINT

Plaintiffs Trans World Airlines, Inc. ("TWA"), Continental Airlines, Inc. ("Continental") and British Airways Plc ("British Airways"), by their attorneys, allege for their complaint on knowledge as to themselves and their own acts and on information and belief as to all other matters, as follows:

THE PARTIES

1. Plaintiff TWA is a corporation organized and existing under the laws of Delaware with its principal place of business at Mount Kisco, New York. As a certificated air carrier, TWA is subject to extensive regulation concerning routes, fares and services by the United States Department of Transportation ("DOT"). TWA advertises its routes, rates and services in newspapers, on radio or television, and in other media available to the public.

2. Plaintiff Continental is a corporation organized and existing under the laws of Delaware with its principal place of business at Houston, Texas. As a certificated air carrier, Continental is subject to extensive regulation concerning rates, routes, and services by the DOT. Continental advertises its rates, routes, and services in newspapers, on radio or television, and in other media available to the public.

3. Plaintiff British Airways is a corporation organized and existing under the laws of England and Wales with its principal place of business at Heathrow Airport in Hounslow, Middlesex, England. As a holder of a foreign air carrier permit, British Airways is subject to extensive regulation concerning rates, routes, and services by the DOT. British Airways advertises its rates, routes, and services in newspapers, on radio or television, and in other media available to the public.

4. Defendant Jim Mattox is the Attorney General of the State of Texas and is sued in his official capacity. The Attorney General is responsible for enforcing the various provisions of Texas law at issue herein.

JURISDICTION AND VENUE

5. This action arises under the Supremacy Clause, Commerce Clause, Compact Clause and the First Amendment of the Constitution of the United States, the Federal Aviation Act of 1958, as amended, 49 U.S.C. §§ 1301 *et seq.* (the "Federal Aviation Act"),

and the regulations and orders promulgated thereunder by the DOT, and is therefore within the jurisdiction of this Court pursuant to 28 U.S.C. §§ 1331

6. Venue is properly laid before this Court pursuant to 28 U.S.C. § 1391 because Attorney General Mattox is a resident of and maintains his office in this district and because Plaintiffs' claims for relief arose in this district. Attorney General Mattox, in concert with numerous other states' attorneys general, has acted through the National Association of Attorneys General (NAAG) to develop and issue NAAG's Air Travel Industry Enforcement Guidelines ("Guidelines"). The threatened enforcement of these Guidelines by Attorney General Mattox, on behalf of himself and other attorneys general in concert, gives rise to this Complaint.

NATURE AND BACKGROUND OF THIS ACTION

7. This is an action for: (i) a declaratory judgment, pursuant to 28 U.S.C. § 2201, declaring that any threatened implementation or enforcement of the Guidelines through Texas Bus. & Com. Code §§ 17.41 *et seq.*, against plaintiffs is unconstitutional insofar as applied to plaintiffs' conduct relating to rates, routes or services, including their advertising and marketing practices relating thereto, with specific reference to the advertisement of fuel, tax and other surcharges; and (ii) preliminary and permanent injunctive relief, pursuant to 28 U.S.C. § 2202 and this Court's inherent equitable powers, enjoining and restraining the implementation of the Guidelines by or on behalf of or in concert with the Attorney General of Texas through enforcement of Texas Bus. & Com. Code §§ 17.41 *et seq.*, with respect to Plaintiffs'

conduct relating to rates, routes or services, including their advertising and marketing practices relating thereto, with specific reference to the advertisement of fuel, tax and other surcharges.

8. Pursuant to the Federal Aviation Act, the DOT and its predecessor, the Civil Aeronautics Board ("CAB"), promulgated extensive rules and regulations governing activities related to air transportation by air carriers and foreign air carriers. These extensive federal rules and regulations relate, *inter alia*, to unfair and deceptive practices in the airline industry, including standards governing price advertising.

9. Congress expressly granted the CAB the authority to promote the public interest through the "prevention of unfair, deceptive, predatory, or anticompetitive practices in air transportation . . . ." 49 U.S.C. § 1302(a)(7). Not only did Congress specifically prohibit such practices, it further authorized the CAB in Section 411 of the Federal Aviation Act to determine whether any air carrier or foreign air carrier "has been or is engaged in unfair or deceptive practices or unfair methods of competition in air transportation or the sale thereof." 49 U.S.C. § 1381. In the event that the CAB finds that a carrier "is engaged in such unfair or deceptive practices or unfair methods of competition, it shall order such air carrier to cease and desist. . . ." *Id.*

10. Also, in amending the Federal Aviation Act by the Airline Deregulation Act of 1978, Pub. L. 95-504, 92 Stat. 1705, Congress provided in Section 105, 49 U.S.C. § 1305, that "no State . . . shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes or services of any [interstate] air carrier." 49 U.S.C. § 1305(a)(1).

11. Acting pursuant to Congressional authorization, the CAB promulgated regulations governing unfair, deceptive, predatory or anti-competitive practices, 14 C.F.R. Part 399, and particularly pertaining to price advertising, 14 U.S.C. § 399.84. Because the Airline Deregulation Act of 1978, *supra*, would otherwise have limited substantially CAB and DOT authority over unfair or deceptive practices related to air transportation beginning in 1985, Congress acted affirmatively in the CAB Sunset Act of 1984, P.L. No. 98-443, 98 Stat. 1703, to reserve all federal authority over these practices. In the CAB Sunset Act, 49 U.S.C. § 1551, Congress transferred "the CAB's authority under Section 411 of the [Federal Aviation] Act, to prevent unfair or deceptive practices" to the DOT. H.R. Rep. Conf. No. 98-1025, 98th Cong., 2d Sess. 15, *reprinted in* 1984 U.S. Code & Admin. News 2857, 2876. Congress' explicit reason for deciding that "there should continue to be authority in the Federal government to protect consumers against unfair and deceptive practices" was, *inter-alia*, that such Federal Aviation Act authority:

> insures a uniform system of regulation and preempts regulation by the states. If there was no Federal regulation, the states might begin to regulate these areas, and the regulations could vary from state to state. This would be confusing and burdensome to airline passengers, as well as to the airlines.

H.R. Rep. No. 98-793, 98th Cong., 2d Sess. 4, *reprinted in* 1984 U.S. Code Cong. & Admin. News 2857, 2860.

12. On information and belief, NAAG is a voluntary association comprised of representatives of the

attorneys general of the fifty states, the District of Columbia, and of various territories. In June 1987, defendant Attorney General Jim Mattox co-sponsored a resolution directing the appointment of a NAAG task force to study the advertising and marketing practices of the airline industry in the United States. The task force was directed to recommend a course of action to NAAG members with respect to alleged consumer concerns in the areas of airline advertising practices, frequent flyer programs, and compensation for denied boarding.

13. The NAAF task force subsequently developed the Guidelines, which purportedly address advertising and marketing practices in the airline industry. (A copy of the NAAG Guidelines is attached as Exhibit "1" in the separately bound Appendix (hereinafter "Appendix") that accompanies this Complaint and Plaintiffs' Memorandum in Support of Plaintiff's Motion for Temporary Restaining Order). According to NAAG, the Guidelines did not establish new laws but were intended to serve as "prosecution guidelines to be used by the states in interpreting their own laws."

14. In September 1987, NAAG circulated a draft of its proposed Guidelines to major airlines, the DOT, and the United States Federal Trade Commission ("FTC"). The comments received from these entities recommended against adoption of the Guidelines. For example, the FTC stated that the task force should refrain from recommending the draft Guidelines and reminded NAAG that the "Federal Aviation Act specifically preempts state regulation of airline rates, routes, or services." Appendix, Exhibit "2" at 2. Similarly, the DOT, in a letter from its General Counsel dated October 19, 1987, stated that "a number of the recommendations appear to be

preempted by the Federal Aviation Act (49 U.S.C. § 1301 *et seq.*) or Department of Transportation (DOT) rules or would unduly burden interstate commerce." Appendix, Exhibit "8" at 1.

15. Notwithstanding these objections, on or about December 12, 1987, NAAG adopted final enforcement Guidelines, stating that they would "serve to advise the airline industry which conduct is permitted and what is prohibited."

16. The Guidelines cover three principal areas. First, they require all advertisements of fares to disclose in a prominent fashion all material conditions connected with the purchase of tickets, specify the manner in which such disclosures should be made, and require that airlines make available a sufficient number of seats on each flight to meet reasonably anticipated demand for any advertised fares. Second, the Guidelines purport to regulate certain terms and condiitons of frequent flyer programs. Finally, the Guidelines direct airlines to disclose all terms and conditions of incentives offered to induce passengers to give up their seats on overbooked flights.

17. Although the Guidelines themselves do not have the force of law, NAAG considers them to be interpretations of already existing state laws dealing with unfair and deceptive practices. Indeed, NAAG has asserted that the Guidelines represent "minimally necessary" regulatory requirements. Subsequently, various state attorneys general acting in concert have taken the position that the Guidelines are proper interpretations of their existing state laws and that they will implement or enforce the Guidelines against air carriers through their various state laws.

18. Following actions by a number of state attorneys general seeking to enforce compliance with

the full price advertising and roundtrip pricing sections of the Guidelines, the DOT, acting through its general counsel, sent a letter dated March 2, 1988, to Attorney General Jim Mattox indicating that "[b]oth of these matters are clearly preempted by Federal law." Appendix, Exhibit "9" at 1. The DOT noted that, applying Setcions 204 and 411 of the Federal Aviation Act, 49 U.S.C. §§ 1324, 1381, the CAB adopted a rule that requires full prive advertising for all components of the advertised air transportation. Since assuming jurisdiction from the CAB for this rule, the DOT has specifically permitted the type of advertising to which the Guidelines object.

19. One state attorney general who has indicated his intent to take enforcement action implementing the Guidelines' fare advertising provisions is defendant Jim Mattox, the Attorney General of the State of Texas. Acting in his official capacity and in concert with other state attorneys general, Attorney General Mattox, through authorized agents of the Office of the Attorney General of Texas, has threatened to institute enforcement proceedings against plaintiffs if their advertising practices do not conform to the Guidelines. Specifically, on November 14, 1988, Stephen Gardner, Assistant Attorney General of the State of Texas, acting on behalf of the States of Texas, California, Massachusetts, New York, and Washington, wrote a letter to various airlines, including plaintiffs, to reaffirm the position of such states that "any fuel, tax, or other surcharge to a fare must be included in the total advertised price of the fare." (Copies of Mr. Gardner's substantially identical letters to plaintiffs TWA, Continental, and British Airways are attached to the Affidavits of Tracy Britton, John Power, and John Williams, which are

Exhibits B, E and G, respectively, to Plaintiffs' Motion for Temporary Restraining Order, which accompanies this Complaint.) Although Mr. Gardner's letter does not expressly refer to the Guidelines, the letter duplicates section 2.5 of the Guidelines, which states that "[a]ny fuel, tax, or other surcharge to a fare must be included in the total advertised price of the fare." (*Id.*) Thus, it is clear that Attorney General Mattox seeks to implement or enforce section 2.5 of the Guidelines through state law.

20. Mr. Gardner's letter indicated that, absent alteration of the advertising, the states would initiate enforcement actions under their respective state laws. It also stated that to allow time to bring the challenged advertising into compliance, no action would be taken until after November 30, 1988, and that any advertisement which appears prior to December 1, 1988, would not be the subject of legal action unless a so-called "deceptive" advertisement appears on or after December 1. Mr. Gardner described his letter as a "formal notice of intent to sue" and as "the final opoprtunity to cure your [alleged] violation of the state laws." (*Id.*)

FIRST CLAIM FOR RELIEF

(Preemption by the Federal Aviation Act, as amended)

21. Plaintiffs repeat and reallege paragraphs 1-20 as if fully set forth herein.

22. Section 105(a) of the Federal Aviation Act, 49 U.S.C. § 1305(a)(1), as amended by the Airline Deregulation Act of 1978, *supra*, expressly preempts any state law, rule or regulation relating to airline

rates, routes or services. It provides in pertinent part:

> [N]o state . . . shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier having authority under subchapter IV of this Act to provide interstate air transportation.

23. Congress' purpose in enacting Section 105 was to prevent conflicts and inconsistent state regulations from being imposed on air carriers and to preclude the states from impeding Congress' decision to deregulate the airline industry. Congress' express intent was to encourage, develop and attain a uniform air transportation system which relies on competitive market forces to determine the quality, variety and price of airline services. To promote uniformity, the DOT was given the sole responsibility for regulating air carriers in any matters relating to routes, rates or services. Because of the DOT's expertise in air transportation matters, Congress vested it with exclusive authority to administer all consumer-related functions in these enumerated areas.

24. Additionally, Section 411 of the Federal Aviation Act prohibits deceptive or unfair practices and specifically authorizes the DOT, as the CAB's successor, to:

> investigate and determine whether any air carrier, foreign air carrier, or ticket agent has been or is engaged in unfair or deceptive practices or unfair methods of competition in air transportation or the sale thereof. If the Board shall find, after notice and hearing, that such air carrier, foreign air carrier, or ticket agent is engaged in

such unfair or deceptive practices or unfair methods of competition, it shall order such air carrier, foreign air carrier, or ticket agent to cease and desist from such practices or methods of competition.

49 U.S.C. § 1381(a) (Section 411).

25. In the CAB Sunset Act of 1984, Congress transferred the CAB's existing authority under Section 411 to the DOT. 49 U.S.C. 1551(b). Congress confirmed that such authority was intended to "insure[] a uniform system of regulation and preempts regulation by the states." H.R. Rep. 98-793, 98th Cong., 2d Sess. 4, *reprinted* in 1984 U.S. Code Cong. & Admin. News 2857, 2860.

26. The DOT has enforced Congress' preemption in Section 105 by regulating all economic factors that go into the provision of a *quid pro quo* for passengers' fares, such as flight frequency and timing, liability limits, reservation and boarding practices, insurance, smoking rules, meal service, entertainment, bonding and corporate financing. The DOT also has expressly indicated that it intends to occupy this field completely pursuant to Congress' direction in Section 105.

27. The DOT has also consistently exercised its enforcement authority under Section 411. Likewise, the DOT, through its General Counsel, has interpreted Section 411 and its implementing regulations, 14 C.F.R. Part 399 and DOT Orders 85-12-68, 88-3-25, and 88-8-2, as preempting regulation by the states of allegedly deceptive or unfair price advertising practices covered by the Guidelines. (Certified copies of the referenced DOT orders appear in the Appendix as Exhibits "5", "6", and "7" respectively.)

28. The NAAG Guidelines directly conflict with Congressional action and intent by seeking to regulate an airline's allegedly deceptive advertising of its rates, routes and services. *See* 14 C.F.R. § 399.84 DOT Orders 85-12-68, 88-3-25 and 88-8-2. (Appendix Exhiibts "5", "6", and "7.") Therefore, the Guidelines and any threatened enforcement actions are expressly preempted by federal law.

29. The three broad areas which are covered by the Guidelines—fare advertising, frequent flyer programs, and denied boarding compensation—and which Attorney General Jim Mattox is threatening to enforce through Texas Bus. & Com. Code §§ 17.41 *et seq.* are all directly related to price advertising, 14 C.F.R. § 399.84, and are integrally "related to rates, routes and services." Indeed, NAAG has expressly acknowledged that one likely effect of the Guidelines will be to cause airlines to eliminate substantive conditions associated with discount fares because of the onerous and unlawful disclosure requirements which the Guidelines impose. Furthermore, given the Guidelines' complicated disclosure requirements, it is likely that airlines will place less broadcast advertising of their air fares than is now the case. The consequential loss of the ability to effectively publicize fare reductions will remove airlines' incentive to cut fares. Thus, Sections 105 and 411 mandate the preemption of the Guidelines as they are enforced through state law, including Texas Bus. & Com. Code §§ 17.41 *et seq.*

30. Even absent Sections 105 and 411, the Guidelines construed in conjunction with Texas and other state law are preempted due to the uniform federal regulatory scheme that governs airline advertising, particularly of international rates, routes and services. The scheme of federal regulation leaves no room for supplementary state regulation of allegedly de-

ceptive advertising of an airline's rates, routes and services.

31. The Federal Aviation Act, as amended, and the DOT's implementing regulations, interpretations and practices, comprehensively deal with fare advertising, frequent flyer programs and denied boarding compensation. State enforcement activity in the areas that attempt to dictate acceptable modes of business activity by the plaintiffs cannot co-exist with federal law on the same subjects, because it stands as an obstacle to implementing Congress' express decision to deregulate the domestic industry as a matter of national policy.

32. Certain provisions of the Guidelines as construed in conjunction with Texas state law are preempted for the additional reason that they conflict in words or in effect with existing federal law. Specifically, pursuant to the requirements of international agreements between the United States and other sovereign nations, and of Section 403 of the Federal Aviation Act, 49 U.S.C. § 1373, plaintiffs must file tariffs for their foreign flight schedules:

> Every air carrier and every foreign air carrier shall file with the Board, and print, and keep open to public inspection, tariffs showing all rates, fares, and charges for air transportation between points served by it. . . . Tariffs shall be filed, posted, and published in such form and manner, and shall contain such information, as the Board shall by regulation prescribe. . . .

49 U.S.C. § 1373. Thus, tariffs are expressly required by federal law and permitted to be advertised by Section 403. However, because the tariffs list separately the component parts of the air fares, the

Guidelines would prohibit their advertisement contrary to express requirements of federal law. Also, subsections 2.5 and 2.6 of the Guidelines require surcharges to be included in the total price advertised and prohibit the advertisement of one-way fares based on a roundtrip purchase only. Those subsections are in direct conflict with 14 C.F.R. § 399.84 and DOT interpretations thereunder such as Orders 85-12-68, 88-3-25 and 88-8-2 (Appendix, Exhibits "5", "6", and "7"), which expressly permit such advertising practices. Indeed, the entire effect of Section 2 of the Guidelines is to decrease or eliminate price competition by airlines, competition which is essential to the success, and indeed is the paramount goal, of the deregulated air transportation market mandated by the Federal Aviation Act, as amended.

33. Under the Supremacy Clause of the United States Constitution, the Guidelines construed in conjunction with Texas Bus. & Com. Code §§ 17.41 *et seq.* or with any other states' laws, are unconstitutional and may not be enforced against plaintiffs.

34. Plaintiffs are incurring unascertainable but real costs and competitive disadvantages by complying with the Guidelines under duress. To the extent the Guidelines restrict advertisements that are expressly required or permitted by Federal statute and regulation, they constitute an impermissible infringement of constitutional rights protected by the Supremacy Clause. Plaintiffs have no adequate remedy at law and have been and will continue to be directly and irreparably harmed if an injunction is not issued.

SECOND CLAIM OF RELIEF
(Violation of Commerce Clause)

35. Plaintiffs repeat and reallege paragraphs 1-34 as if fully set forth herein.

36. Plaintiffs are involved in interstate commerce and also engage in foreign commerce. They engage in the advertising of their services in the various states and have customers who purchase their services in the various states and internationally.

37. Implementation or enforcement of the Guidelines through various state laws, including Texas Bus. & Com. Code §§ 17.41 *et seq.*, and as applied to plaintiffs' interstate and international activities, imposes direct and excessive burdens on foreign and interstate commerce.

38. Unless the Court acts to restrain the threatened enforcement against plaintiffs of Texas Bus. & Com. Code §§ 17.41 *et seq.*, as construed in accordance with the Guidelines, plaintiffs will be faced with undue and impermissible burdens on their ability to engage in interstate and foreign commerce as a result of the potential for contradictory regulatory obligations imposed by states whose standards differ, or may differ, from those of Texas.

39. Plaintiffs now will be subject to multi-tiered regulations, with conflicting demands imposed by the DOT, the State of Texas and a possible multitude of conflicting state regulations caused by the differing interpretation of the Guidelines by other NAAG members. For example, the Attorney General of New York has a different interpretation from Attorney General Mattox, and another NAAG member, the Attorney General of New Mexico, objects to the Guidelines. Such varying enforcement positions by the NAAG members run counter to Congress' intention of avoiding confusion and inconsistent regulation of the airline industry by providing the DOT with pre-emptive authority in this area.

40. Moreover, to the extent that plaintiffs can run advertisements in compliance with all the different laws of the various states, the exacting detail the Guidelines require to be disclosed will cause the number of such advertisements to decline. This, in turn, will decrease price competition in the industry, a result directly contrary to Congress' stated national polciy, as embodied in the Airline Deregulation Act of 1978.

41. Wholly apart from the issue of the potential for conflicting or differing interpretations of the Guidelines, threatened enforcement action by a single large state, such as Texas, will inevitably have interstate effects. Because it is impossible as a practical matter for plaintiffs to tailor advertisements disseminated through interstate media to meet individual state requirements, a single state will inevitably coerce plaintiffs into conforming their national advertising and marketing practices to those requirements; ultimately, such conformance will be to the requirements imposed my the most restrictive jurisdiction.

42. In addition to the adverse effects on interstate commerce which are posed by the threatened actions of Attorney General Mattox under the NAAG Guidelines, there is also the threat of a serious disruption of foreign commerce. By attempting to regulate the manner in which both foreign and domestic airlines provide and market their air transportation services, Attorney General Mattox is intruding into matters involving the foreign commerce and foreign relations of the United States.

43. The regulatory scheme for international aviation involves a complex combination of federal statutes and international agreements, including over eighty treaties and executive agreements between the United States and other sovereign nations. Because international aviation is governed by treaty and executive agreements, there is always the possibility of a conflict between these international agreements and U.S. domestic law, and of friction between the United States and foreign governments should domestic laws be applied inconsistently with the requirements of the United States' international obligations. Congress has recognized this possibility and addressed the problem by directing that U.S. laws and regulations be applied consistently with international agreements. *See* 49 U.S.C. § 1502(a). Furthermore, Congress has reserved for the President the exclusive right to disapprove actions by the regulatory authorities, such as rejection of international tariffs, that might disrupt the foreign relations of the United States. *See* 49 U.S.C. § 1461(b).

44. In the area of international relations and the regulation of foreign trade and commerce, the federal government of the United States must speak with a single voice and act through a single government. Under Article I of the United States Constitution, Congress has the exclusive and plenary power to regulate commerce with foreign nations. Through the Federal Aviation Act of 1958, as amended, Congress has delegated this authority in the area of air transportation to the President and the DOT. They alone may speak for the nation. Consequently, the actions of Attorney General Mattox in threatening to implement and enforce the Guidelines under the Texas law have been taken in derogation of the Constitutional allocation of power to the central government to regulate foreign commerce.

45. Under the Commerce Clause and the Supremacy Clause of the United States Constitution, Texas Bus. & Com. Code §§ 17.41 *et seq.*, and any other states' laws construed in conjunction with the Guidelines, are unconstitutional as applied to plaintiffs and may not be enforced. The pertinent Texas statutes (and any other state laws) construed in accordance with the Guidelines impose an unreasonable and impermissible burden on the flow of interstate and foreign commerce and unreasonably and impermissibly regulate and affect plaintiffs' conduct in such states.

46. Plaintiffs have been threatened with an enforcement action by the Attorney General of Texas and by other states' attorneys general acting in concert with him, unless plaintiffs comply with the Guidelines. To the extent that plaintiffs are complying with this unconstitutional assertion of power, they are doing so under duress and have been and will continue to be immediately and irreparably harmed for so long as this threat continues. Plaintiffs have no adequate remedy at law.

THIRD CLAIM FOR RELIEF
(Violation of Interstate Compact Clause)

47. Plaintiffs repeat and reallege paragraphs 1-46 as if fully set forth herein.

48. The Compact Clause of the U.S. Constitution states in pertinent part as follows:

> No State shall, without the Consent of Congress, . . . enter into any Agreement or Compact with another State . . .

U.S. Const. art. I, § 10, cl. 3.

49. The actions of the Attorney General of the State of Texas and the other members of NAAG in their concerted activities in developing, issuing, and agreeing to enforce the Guidelines through their own states' laws constitute the formation of an illegal agreement or compact among the states. The compact is illegal because it has the effects of both increasing the political power of the states and encroaching substantially on national and international interests that are the exclusive domain of the federal government. Enforcement of the Guidelines clearly encroaches on federal authority "to protect consumers against unfair and deceptive practices" in the air travel industry, as set forth in the legislative history accompanying the CAB Sunset Act of 1984, Pub. L. No. 98-443. H.R. Rep. No. 98-793, 98th Cong., 2d Sess. 4, *reprinted in* 1984 U.S. Code Cong. & Admin. News 2857, 2860. Congress has not consented to these concerted actions of the states, acting through their respective attorneys general. Because the Guidelines seek to enhance the states' authority *quoad* the federal government, they violate the Compact Clause.

50. Plaintiffs are being irreparably injured as a result of defendant's illegal and unconstitutional interstate compact. Plaintiffs have no adequate remedy at law. Consequently, plaintiffs are entitled both to a declaration that the Guidelines are void and unenforceable, and an injunction preventing any attempt by the Attorney General of Texas, or any NAAG member in active concert or participation with him, from enforcing the Guidelines through their state laws.

FOURTH CLAIM FOR RELIEF
(Violation of First Amendment)

51. Plaintiffs repeat and reallege paragraphs 1-50 as if fully set forth herein.

52. Commercial speech is protected against governmental suppression or undue regulation by the First Amendment of the United States Constitution.

53. If commercial speech concerns a lawful activity and is not inherently misleading or fraudulent, the government may not restrict the manner, form and content of commercial speech unless the government's interest in doing so is substantial, the restrictions directly advance the government's asserted interests, and the restrictions are no more extensive than necessary to serve that interest.

54. Plaintiffs' fare advertisements and other promotional and informational material are commercial speech. That information concerns a lawful activity —the provision of airline services—and is not inherently misleading or fraudulent since it is in conformity with the Orders of the DOT, the federal agency vested with exclusive jurisdiction over consumer protection issues in the airline industry.

55. Neither the state of Texas, nor any other state whose attorney general is actively in concert with Attorney General Mattox, has any cognizable interest in restricting and dictating the manner, form and content of plaintiffs' commercial speech through the application of its respective state laws, including Texas Bus. & Com. Code §§ 17.41 *et seq.*, as construed in accordance with the Guidelines. To the extent that there are substantial government interests in regulating, plaintiffs commercial speech, Congress has delegated the sole responsibility for such regulation to the DOT. In any event, the means of regula-

tion which Texas and its companion states have chosen do not directly advance Texas' or any other states' purported interest.

56. Most importantly, the restrictions and dictates that Texas and other states are trying to force plaintiffs to adhere to under threat of enforcement proceedings are overbroad and far more extensive than are necessary to serve any legitimate Texas state interest. The threatened application of Texas' and other states' laws to plaintiffs in this regard constitutes an unlawful prior restraint and is therefore violative of the First Amendment.

57. The *per se* rules set forth in the Guidelines bear no necessary relationship to whether an advertisement is, in fact, false and deceptive. The Texas Deceptive Trade Practices Act, Texas Bus. & Com. Code §§ 17.41 *et seq.*, as construed by Attorney General Mattox in conjunction with the Guidelines, is overbroad and fails to adhere to the constitutional requirement that it be no more extensive than necessary to serve the government's interest in regulating commercial speech; in this case, a non-existent interest.

58. Plaintiffs' constitutionally protected rights to engage in commercial speech have been and are being illegally chilled and restricted. To the extent that plaintiffs are complying with this unconstitutional assertion of power, they are doing so under duress and have been and will continue to be immediately and irreparably harmed for so long as this continues unchecked. Plaintiffs have no adequate remedy at law.

WHEREFORE, plaintiffs demand that judgment be entered:

(a) declaring that implementation or enforcement of section 2.5 of the Guidelines through Texas Bus. &

Com. Code §§ 17.41 *et seq.* or any other state law is unconstitutional as applied to plaintiffs under the Supremacy Clause of the United States Constitution, Article VI, cl. 2;

(b) declaring that implementation or enforcement of section 2.5 of the Guidelines through Texas Bus. & Com. Code §§ 17.41 *et seq.* or any other state law is unconstitutional as applied to plaintiffs under the Commerce Clause of the United States Constitution, Article I, § 8, cl. 3, because those laws impose an impermissible burden on interstate and foreign commerce;

(c) declaring that implementation or enforcement of section 2.5 of the Guidelines through Texas Bus. & Com. Code §§ 17.41 et seq. or any other state law is unconstitutional as applied to plaintiffs under the Compact Clause of the United States Constitution, Article I, § 10, cl. 3, because such implementation or enforcement would be the result of an illegal interstate compact that has not been approved by Congress;

(d) declaring that implementation or enforcement of section 2.5 of the Guidelines through Texas Bus. & Com. Code §§ 17.41 *et seq.* or any other state law is unconstitutional as applied to plaintiffs under the First Amendment of the United States Constitution, because these laws impermissibly restrict constitutionally protected commercial speech;

(e) preliminarily and permanently enjoining the Attorney General of the State of Texas, Jim Mattox, and all other persons acting for or in active concert or participation with the Attorney General or the State of Texas, from taking any action against plaintiffs pursuant to Texas Bus. & Com. Code §§ 17.41 *et seq.* or any other state law in conjunction with the

NAAG Guidelines as they purport to regulate plaintiffs" rates, routes or services, or plaintiffs' marketing or plaintiffs' advertising of their rates, routes and services;

(f) granting plaintiffs the costs and disbursements of this action, including attorney's fees; and

(g) granting such other and further relief as the Court deems just and proper.

Respectfully submitted,

By /s/ Ronald D. Secrest
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APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

C.A. No. A 89 CA0067

TRANS WORLD AIRLINES, INC.,
CONTINENTAL AIRLINES, INC., AND
BRITISH AIRWAYS PLC, PLAINTIFFS

v.

JIM MATTOX, Attorney General of the
STATE OF TEXAS, DEFENDANT

[Filed Jan. 27, 1989]

MOTION OF SPECIALLY APPEARING STATES TO DENY PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER OR IN THE ALTERNATIVE MOTION TO EXTEND DATE FOR HEARING ON TEMPORARY ORDER

Without admitting or submitting to the subject matter jurisdiction of this Court and without admitting that this Court has personal jurisdiction over them, the states of Kansas, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Florida, Illinois, Iowa, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, Nevada, New York, North Carolina, North Dakota, Ohio, Okla-

homa, Oregon, Rhode Island, South Dakota, Tennessee, Vermont, Washington, West Virginia, Wisconsin and Wyoming specially appear before this Court to move for an order denying the plaintiffs' motion for a temporary restraining order or in the alternative to ask this Court to set a future date upon which to hear plaintiffs' motion as a noticed motion for temporary restraining order.

I.

THIS COURT SHOULD DENY PLAINTIFFS' MOTION FOR A TEMPORARY RESTRAINING ORDER

Plaintiffs' motion for a temporary restraining order should be denied because the injunctive relief plaintiffs are seeking could affect the sovereign rights of states which have neither been served nor named as defendants in the instant action. On Tuesday, January 24, 1989, four of the above named specially appearing states (California, Washington, Massachusetts and New York) received notice from the Texas Attorney General's office that Jim Mattox, Attorney General of Texas, had been sued by the plaintiffs herein and that part of the relief being sought by plaintiffs was an injunction which would "(a) preliminarily and permanently enjoin . . . the Attorney General of the State of Texas, Jim Mattox, and all other persons acting for or in active concert or participation with the Attorney General of the State of Texas, from taking any action against plaintiffs pursuant to . . . any other state law in conjunction with the NAAG Guidelines as they purport to regulate plaintiffs' rates, routes, or services, or plaintiffs' marketing or plaintiffs' advertising of their rates, routes and services (Complaint at 26).

California, Massachusetts, New York and Washington were further informed that plaintiffs in their action claimed that all the states whose attorneys general belong to the National Association of Attorneys General (NAAG), were acting "in concert" and "participating" with the State of Texas and that plaintiffs' prayer could have the effect of prohibiting such states from enforcing their own laws even though they were not named as defendants nor served by plaintiffs with a copy of the action currently before this Court.

Most of the other 29 states which have specifically appeared to join in this motion did not receive notice of this pending action until Wednesday, January 25, 1989.

The very day that plaintiffs initiated this instant action, oral argument was conducted in the D.C. Circuit in *State of Alaska, et al. v. Department of Transportation*, 88-1348 and 88-1682 (consolidated). In that action, 27 states sued the DOT seeking to reverse the very orders which are at the heart of plaintiffs' action herein. Plaintiffs' pleadings assert that the states lack to right, in their sovereign capacity, to enforce state laws prohibiting false and deceptive advertising. Based on their allegations, plaintiffs are attempting by sleight of hand to effect the rights of states which they have neither named nor had the courtesy of serving with their pleadings. Accordingly, these petitioning states request that this Court deny plaintiffs' motion for a temporary restraining order.

II.

IF THE SPECIALLY APPEARING STATES' REQUEST IS DENIED, THIS COURT SHOULD, IN THE ALTERNATIVE, ADJOURN THIS HEARING FOR A FUTURE DATE

In their pleadings plaintiffs raise issues which sound in Constitutional terms of the highest order- alleged violations of the Supremacy Clause, alleged violations of the Commerce Clause, alleged illegal interstate compacts in violation of the Compact Clause, alleged abridgement of First Amendments rights and alleged preemption. These states seek nothing more than the time necessary to review plaintiffs' voluminous pleadings, briefs, motions, and exhibits; to decide in orderly fashion how and whether to respond to them; and to decide whether to seek leave from this Court to file an Amicus Curiae Brief or to seek leave to intervene. We therefore request this Court to set down plaintiff's motion for a hearing at a reasonable time in the future so as to allow for a more complete hearing on the issues. Such a request is only reasonable.

Plaintiffs claim that the genesis of their action is a NAAG report issued in December, 1987, and a letter they received from the Texas Attorney General's office on behalf of Texas, California, Washington, Massachusetts and New York, which was dated November 14, 1988. Plaintiffs make no allegations of any changed circumstances in either the last thirteen (13) months nor in the last ten (10) weeks which now require this Court to take the drastic action of issuing a temporary restraining order on four days notice to the named defendant state only without giving other, possibly affected, states an opportunity

to present their arguments, if they so desire, to the Court.

If plaintiffs feel that the Texas letter has caused the change in circumstances which requires them to take action, they have had, at a minimum, over ten (10) weeks to prepare their pleadings and documents so they could present their best argument to this Court. In this action, which threatens to affect the ability of states to exercise their police powers, the specially appearing states should also be given adequate time to present their best arguments to this Court.

In the only reported case dealing with the issue of whether a state can enforce its truth in advertising laws against an airline's advertisements of its DOT allowed airfares (*The People of the State of California v. Western Airlines, Inc.* 155 Cal. App.3d 597, 202 Cal. Rptr. 237 (1984), *cert. den.* 469 U.S. 1132 (1985)), the court held that the states could properly exercise their police powers. (*See also, I.C. Brunwasser v. Trans World Airlines, Inc.*, 541 F. Supp. 1338 (W.D. Pa. 1982) wherein the court held that a private cause of action alleging deceptive airline advertising of a DOT approved rate was not pre-Aviation Act.) While the states believe nothing has happened which would lead to a change in the previous decision, the states need time to review plaintiffs' pleadings in order to determine how best to respond in an appropriate manner.

CONCLUSION

For the above reasons, these specially appearing petitioning states respectfully request that this Court deny plaintiffs' motion for a temporary restraining

order or ask, in the alternative, that a later date be set for a hearing on plaintiffs' motion.

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Certificate of Service

I certify that the foregoing Motion of Specially Appearing States to Deny Plaintiffs' Motion for Temporary Restraining Order or in the Alternative Motion to Extend Date for Hearing on Temporary Restraining Order was served on all plaintiffs by hand delivery to their attorney of record on January 27, 1989.

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☆ U. S. GOVERNMENT PRINTING OFFICE: 1991 312324 45109

Nos. 90-1604
90-1606

Supreme Court, U.S.
FILED
MAY 20 1991
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1990

DAN MORALES, ATTORNEY GENERAL OF TEXAS, et al.,

Petitioners,

vs.

TRANS WORLD AIRLINES, INC., et al.,

Respondents.

On Petitions For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF AMICI CURIAE OF THE STATES OF HAWAII, ALABAMA, INDIANA, LOUISIANA, MISSISSIPPI, NEW JERSEY, NEW MEXICO, PENNSYLVANIA, UTAH AND VIRGINIA IN SUPPORT OF PETITIONERS

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The amici States enumerated above, by their respective Attorneys General, submit this brief in support of the petitions for certiorari to the United States Court of Appeals for the Fifth Circuit filed by the Attorney General of Texas and the thirty-one other State Attorneys General from the judgment entered in the proceeding below on January 18, 1991.

INTEREST OF AMICI CURIAE

The amici States have a significant interest in seeing that they have the right to enforce their own state false and deceptive advertising laws against airlines that engage in unfair and deceptive airline advertising practices in order to protect their citizens from the obvious harm such advertising may bring. If the decision of the Fifth Circuit is allowed to stand, the amici States, indeed all States, may be barred from protecting their citizens from deceptive airline advertising. Such an evisceration of the States' historic police powers to engage in consumer protection cannot be upheld absent a clear and manifest mandate of Congress to that effect, a mandate that was clearly lacking in this case. Furthermore, the amici States have a strong interest in seeing that they not be subject in the future to the overreaching assertion of jurisdiction by a single Federal District Court on the basis of a mere special appearance, when there is no valid basis for personal jurisdiction, and where there is also no ripe controversy providing the court with subject matter jurisdiction to issue injunctive relief.

ARGUMENT

I. The Fifth Circuit's Holding that State False and Deceptive Advertising Laws are Preempted is Plainly Wrong as a Matter of Law and Conflicts with Decisions of this Court, other Courts of Appeals, a State Appellate Court, and Numerous United States District Courts.

In *Nader v. Allegheny Airlines*, 426 U.S. 290 (1976), this Court held that § 411(a) of the Federal Aviation Act, 49

U.S.C. § 1381(a), authorizing the Civil Aeronautics Board (CAB) to issue cease and desist orders against unfair or deceptive practices or unfair methods of competition, did not impliedly preempt state common-law tort actions based on fraudulent misrepresentation by an air carrier. In allowing state law causes of action to proceed, this Court stated that "§ 411(a) confers upon the Board a new and powerful weapon against unfair and deceptive practices that injure the public. But it does *not* represent *the only*, or best, response to all challenged carrier actions that result in private wrongs." 426 U.S. at 303 (emphasis added). By analogy therefore, § 411(a) does not impliedly preempt State false and deceptive advertising laws. Even if a particular airline advertising practice did not constitute an unfair or deceptive practice under § 411(a), the states would still be allowed to enforce their own state false and deceptive advertising laws against the practice. *Cf. Nader*, 426 U.S. at 301-02 ("No power to immunize can be derived from the language of § 411. . . . Section 411 is both broader and narrower than the remedies available at common law.").

Although the federal preemption provision, § 105(a)(1) of the Federal Aviation Act, 49 U.S.C. § 1305(a)(1), was not enacted at the time of *Nader* (being added in the Airline Deregulation Act of 1978), § 411(a) has remained essentially unchanged, except for the fact that the Department of Transportation, and not the Civil Aeronautics Board, is now the federal governmental body responsible for monitoring unfair and deceptive practices in the airline industry. Therefore, *Nader*'s holding of no implied § 411 preemption of state laws concerning unfair and deceptive practices is still the law today.

Because any implied preemption argument was foreclosed by *Nader*, the Fifth Circuit instead based its decision on an erroneous interpretation of the § 105(a)(1) preemption provision added by the Airline Deregulation Act, which states:

> [N]o state . . . shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to *rates, routes, or services* of any air carrier having authority under subchapter IV of this chapter to provide air transportation.

§ 105(a)(1) (emphasis added). Because the states in the exercise of their police powers have historically and traditionally been the primary regulators in the area of consumer protection, preemption of such matters will not be found unless that is the "clear and manifest purpose" of Congress. *See Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Not only can no clear and manifest purpose of Congress to preempt state regulation of false and deceptive advertising practices be discerned in either the plain language of § 105(a)(1) or its legislative history, but in fact the plain language and history actually suggest the exact opposite.

Section 105(a)(1), by its plain language, only preempts laws directly relating to *rates*, *routes*, or *services*, and not to laws controlling the *advertising* of rates, routes, or services. *See People v. Western Airlines*, 155 Cal.App.3d 597, 600, 202 Cal. Rptr. 237, 238 (1984), *cert. denied*, 469 U.S. 1132 (1985); *Kansas v. Trans World Airlines*, 730 F.Supp. 366, 368 (D.Kan. 1990). Had Congress intended to preempt State false and deceptive advertising laws, it could have easily done so by simply adding the phrase,

"or the advertising thereof." The States' false and deceptive advertising laws are not intended to, and do not in fact, determine anything at all with regard to what airlines charge, what routes they take, or what services they provide. State false and deceptive advertising laws merely ensure that whatever the rates, routes, and services the airlines choose to have, which amici States concede they may not regulate, that they are not deceptively advertised in the free market. *See New York v. Trans World Airlines*, 728 F.Supp. 162, 176 (S.D.N.Y. 1989). The Fifth Circuit's attempt to construe "relating to rates, routes, or services" to encompass advertising is thus unwarranted.

The Circuit's heavy reliance on *Shaw v. Delta Air Lines*, 463 U.S. 85 (1983), is misplaced. In *Shaw*, this Court held that a New York Human Rights Law forbidding discrimination in employee benefit plans on the basis of pregnancy was preempted by a federal ERISA provision superseding all State laws "relat[ing] to any employee benefit plan." It was obvious in that case that the anti-discrimination provision would *directly* affect the *substantive* content of employee benefit plans and thus clearly "related to" employee benefit plans. Employers subject to the law would be substantively constrained in setting up their benefit plans. Here, however, the regulation of the advertising of rates does *not* directly affect the substantive rates themselves. The airlines are free to charge whatever they wish, regardless of any state deceptive advertising restrictions. Thus, *Shaw* is wholly inapposite.

To the extent State penalties or injunctions on deceptive airline advertising or the adoption of practices by an airline to avoid such state enforcement actions indirectly

affect rates, such an impact on rates would be merely *incidental*. As this Court stated in the exactly analogous situation in *Nader*, "any impact on rates that may result from the imposition of tort liability or from practices adopted by a carrier to avoid such liability would be merely incidental." 426 U.S. at 300; *see also Western Airlines*, 155 Cal.App.3d at 600, 202 Cal.Rptr. at 239.

There is, in fact, an important intercircuit conflict that needs resolution here. The Ninth Circuit, for example, has rejected the sort of overly expansionist reading of § 105(a)(1)'s "relating to" language at the root of the Fifth Circuit's decision. *See, e.g., West v. Northwest Airlines*, 923 F.2d 657, 660 (9th Cir. 1990); *Air Transport Ass'n of America v. Public Utilities Comm'n*, 833 F.2d 200, 207 (9th Cir. 1987), *cert. denied*, 108 S.Ct. 2904 (1988).

The legislative history also unambiguously supports the position that § 105(a)(1) was only intended to preclude state laws that directly impact rates, routes, or services, and not the deceptive advertising of those matters. There is no reference in the legislative history to § 105(a)(1) that even mentions airline advertising. The section was enacted with the intent of providing for exclusive federal control of airline rates, routes and services, with such federal control to be limited in the context of deregulation. It would, of course, have been inconsistent with deregulation to allow the states to simply fill the void left by federal deregulation. Hence, § 105(a)(1) was needed to prevent any attempts by the states to regulate airline rates, routes, or services. But state regulation of airline *advertising*, so long as the state does not attempt to affect or determine the rates, routes, or services themselves, does not in any way interfere with

Congress' goal of deregulation of airline rates, routes, and services.

In enforcing their deceptive advertising laws against the airlines, the States have no interest in what the airlines charge, but only seek to ensure that they represent their charges fairly and nondeceptively. The Fifth Circuit's only other argument to support their overbroad construction of § 105(a)(1), outside of the flawed *Shaw* analogy, is essentially an implied *§ 411* preemption argument. It notes, for example, that the CAB's § 411 powers were not terminated under the Airline Deregulation Act, but rather were eventually transferred by operation of law to DOT, and somehow concludes that Congress thereby intended to protect consumers by providing a uniform system of federal regulation of unfair or deceptive practices by airlines. *See Trans World Airlines v. Mattox*, 897 F.2d 773, 782-83 (5th Cir. 1990). This, of course, is the very same implied preemption argument flatly rejected by this Court in *Nader*. *See supra* pp. 2-3. The only uniformity that Congress intended was in connection with rates, routes, and services, *see* H.R. Rep. No. 1211, 95th Cong., 2d Sess., *reprinted in* 1978 U.S. Code Cong. & Admin. News 3737, 3751-52, but with regard to deceptive *advertising*, Congress allowed both a federal and state presence. *Cf. Nader* (allowing state common law misrepresentation claim to coexist with § 411).

In sum, not only was this Court's stringent preemption standard of a "clear and manifest purpose" of Congress not satisfied with regard to preemption of state deceptive advertising laws, but if there was any clear Congressional intent at all regarding airline advertising,

it was that the states should be free to enforce their deceptive advertising laws.

Other conflicts also merit review here. The United States Court of Appeals for the District of Columbia implicitly rejected § 105(a)(1) preemption of state deceptive advertising laws in *Alaska v. U.S. Dep't of Transportation*, 868 F.2d 441 (D.C. Cir. 1989). The State of Alaska was held to have standing to challenge various DOT airline advertising rules (on the ground that the rules were not adopted pursuant to proper notice-and-comment procedures) because the rules would conflict-preempt state deceptive advertising laws. If § 105(a)(1) expressly or impliedly preempted all state deceptive advertising laws, then Alaska would not have had standing to challenge the specific DOT rules, because Alaska's injury, the inability to enforce their deceptive advertising laws, would not be redressed by a striking down of the DOT rules. In other words, the Court's holding was premised on the assumption that only *conflict* preemption was at issue, and that there was no express or implied preemption of all state advertising laws under § 105(a)(1). 868 F.2d at 444 ("The 1988 [DOT] Orders . . . provide the only possible basis for preemption of state regulation. . . .).

The California Court of Appeal in *People v. Western Airlines*, 155 Cal.App.3d 597, 202 Cal.Rptr. 237 (1984), and numerous United States District Courts, *see, e.g., Kansas v. Trans World Airlines*, 730 F.Supp. 366, 368 (D.Kan. 1990); *New York v. Trans World Airlines*, 728 F.Supp. 162, 176 (S.D.N.Y. 1989), have also expressly rejected § 105(a)(1) preemption of state deceptive advertising laws, in direct contradiction to the Fifth Circuit's decision.

In conclusion, this case presents an important question of federal law that affects the ability of all the States in the Union to protect their citizens from the direct injury caused to consumers from deceptive advertising, and the broader economic damage to the efficiency of a marketplace forced to operate with deceived market participants. If certiorari is not granted, there will be a continued waste of judicial resources as courts throughout the nation will be forced to resolve this issue. Furthermore, a definitive resolution by this Court will eliminate the existing burdens on all parties concerned (both the airlines, as well as the States) of having conflicting decisions controlling different parts of the Union.

II. Uncontroverted Case Law Clearly Establishes that the District Court Had No Valid Basis for Asserting Personal Jurisdiction Over any of the State Attorneys General, other than Texas', and Thus Its Extension of Injunctive Relief to Those Attorneys General Is Void.

The 33 Attorneys General had no contacts at all, let alone "minimum contacts," with the State of Texas that justified the Federal District Court in Texas' exercise of personal jurisdiction over them. *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). Similarly, the Texas Long-Arm Statute, Tex. Civ. Prac. & Rem. Code Ann. § 17.042 (Vernon 1986), which goes to the limits of Due Process, *see Placid Investments, Ltd. v. Girard Trust Bank*, 689 F.2d 1218 (5th Cir. 1982), does not provide for the exercise of jurisdiction over these 33 wholly out-of-state attorneys general who, from what is in the record, do not do any

business within the State of Texas, contract with Texas residents, or commit torts in Texas.

The only conceivable underpinning for the assertion of jurisdiction, and the one which formed the basis for the Fifth Circuit's decision, is the fact that those 33 Attorneys General entered a special appearance in the case in order to protect themselves from being bound by a potentially expansive reading of the District Court's original order. It is beyond dispute that those Attorneys General did not intend nor expect that their special appearance was to be deemed consent to the exercise of personal jurisdiction over them. Their motion was unequivocal on this point, stating:

> Without admitting or submitting to the subject matter jurisdiction of this Court and *without admitting that this Court has personal jurisdiction over them*, the States of Kansas, Alaska, [etc.] *specially appear* before this Court to move for an order denying the plaintiffs' motion for a temporary restraining order . . . .

(emphasis added).

Existing precedent and traditional notions of fair play and substantial justice do not allow such precautionary measures on the part of the 33 attorneys general to amount to consent to the exercise of personal jurisdiction.

The Fifth Circuit noted that the federal courts have abolished the distinction between general and special appearances but then drew the wrong conclusion. The abolition of the distinction means that a party need not insure that the proper procedures for a "special appearance" are followed in order to preserve objections to personal jurisdiction; what formerly would have been

called a "general appearance" will not even waive such objections. *See* 5A Wright & Miller, Federal Practice and Procedure § 1344. The use of the words "special appearance," however, do serve to emphasize that a party is not waiving his objections to jurisdiction. *See Bjorgo v. Weerden*, 342 F.2d 558, 560 (7th Cir. 1965).

Waiver only occurs where a *party* files a Rule 12 motion and fails to include an objection to personal jurisdiction, or fails to include the defense in its responsive pleading. *See* Fed.R.Civ.P. 12(h)(1); 5A Wright & Miller, *supra*, § 1391 at 741-42. Since none of the 33 attorneys general were even parties at the time they filed their special appearance, no 12(h) waiver could occur.[1]

Therefore, the Fifth Circuit instead finds personal jurisdiction, citing *Cactus Pipe & Supply v. M/V Montmartre*, 756 F.2d 1103 (5th Cir. 1985), and *Grammenos v. C.M. Lemos*, 457 F.2d 1067 (2d Cir. 1972), by claiming that the 33 attorneys general sought "affirmative relief" and thereby waived objections to personal jurisdiction. But *Cactus Pipe* and *Grammenos* do not support waiver under the facts of our case. Those cases stand for the proposition that where a party enters a case, fails to object to jurisdiction, and seeks *affirmative relief*, that party waives objections to personal jurisdiction. *See Cactus Pipe*, 756 F.2d at 1108 (*citing Grammenos*, 457 F.2d at 1070). Contrary

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[1] Moreover, the 33 attorneys general did effectively object to personal jurisdiction by noting in their motion that they were not admitting that the court had personal jurisdiction over them, and by arguing at the TRO hearing that the court had no personal jurisdiction over them.

to the Fifth Circuit's summary conclusion, the 33 attorneys general did *not* seek any such *affirmative relief*.

The Fifth Circuit erroneously believed that the attorneys' general request that the plaintiffs' TRO be denied was the equivalent of the seeking of affirmative relief. It was not. It was merely a request that the *plaintiffs'* demand for affirmative relief be denied. The *affirmative* relief mentioned in *Cactus Pipe* and *Grammenos* refers to *counterclaims* or other claims for relief benefiting the defendants, not the denial of relief to the plaintiff. *See* 5A Wright & Miller, *supra*, § 1397.[2] This distinction makes sense because one who seeks to employ the court's jurisdiction to achieve some affirmative relief for oneself should not then be heard to deny the court's jurisdiction as to the opposing party's claim. *See* 5A Wright & Miller, *supra*, § 1397 at 787-88.

In the case at bar, however, the 33 Attorneys General never sought to benefit from the Texas District Court's jurisdiction by seeking affirmative relief, but merely sought to ensure that the Court not grant relief for the plaintiffs against them.[3] Unlike the counterclaim situation, it is perfectly consistent for a party to come into court contending that the court has no jurisdiction over that party, and at the same time argue that, if the court

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[2] And it is not even settled that the assertion of counterclaims waives objections to personal jurisdiction. *See* 5A Wright & Miller, *supra*, at 788-92.

[3] Furthermore, even if the 33 attorneys general could be deemed to have sought affirmative relief, *Cactus Pipe* and *Grammenos* would still not suggest waiver because the attorneys general, as noted in footnote 1, did object to jurisdiction.

ultimately concludes that it does have jurisdiction, relief should not be granted against it on the merits.

In sum, there is absolutely no basis in the law for the Fifth Circuit's conclusion that the 33 Attorneys General waived their objections to personal jurisdiction by merely filing a motion requesting that plaintiffs' demand for equitable relief be denied.

Despite the fatal absence of personal jurisdiction over these attorneys general, the District Court invoked Rule 19 joinder, and the Fifth Circuit concocted a rule of "de facto intervention." None of these theories can overcome the fundamental jurisdictional problem discussed above.

In any event, Rule 19 can only be employed to join a "person who is subject to service of process." Rule 19(a). Because the 33 out-of-state attorneys general were not subject to service of process, see Fed.R.Civ.P. 4(e) & Texas Long-Arm Statute (there is no connection between these 33 attorneys general and the State of Texas), the District Court had no authority to invoke Rule 19 joinder, and the Fifth Circuit apparently agreed. Even if the Texas Long-Arm Statute allowed service of process upon these attorneys general, the district court would still not have had *in personam* jurisdiction over such attorneys general because they lacked the constitutionally required "minimum contacts" necessary to satisfy due process.

The Fifth Circuit, realizing the inapplicability of Rule 19, or Rule 24 intervention, resorted instead to the creation of a novel theory it dubbed "de facto intervention." There is simply no basis in the rules or in precedent for such a doctrine. This Court should not tolerate a federal court's amendment of the rules to suit its own agenda.

Equally importantly, there is no good reason to create such a fiction. The desire to render a "meaningful decision" surely cannot override the fundamental principles of due process violated by the local federal district court's attempt to assert its power over sovereign States clearly outside its jurisdictional reach. Moreover, it was unnecessary for the district court to extend its injunction beyond Texas in order to render a "meaningful decision." Furthermore, given the fact that the district court's conclusion on preemption is contrary to other courts' rulings on the matter, the district court should have been more reluctant, rather than less, to extend its controversial ruling to other States.

Most significantly, if this doctrine is allowed to stand, parties who fear being bound by pending court rulings would be forced to just sit by and hope that the court does not include them out of fear that any attempt they make to convince the court not to include them would subject them to that court's *in personam* jurisdiction. The Federal rules could hardly have intended such an absurd result.

The petition for certiorari should be granted in order to ensure that the District Courts do not ignore the fundamental due process limitations on their power.

III. Contrary to this Court's Longstanding Refusal to Allow Federal Courts to Issue Decisions in Cases Not Involving Actual Cases or Controversies, the District Court Improperly Extended Its Injunctive Order to Cover 28 State Attorneys General who had taken No Actions that Could Create a Ripe Controversy.

None of the plaintiff airlines alleged, nor could they allege, that any of the attorneys general, except those of

California, Kansas, Massachusetts, New York, Texas and Washington, have threatened or initiated any legal actions against any of the plaintiff airlines for violations of their respective deceptive advertising statutes. Because as to these 28 attorneys general there was thus no ripe "case or controversy" under Article III of the Constitution, the District Court lacked subject matter jurisdiction to include them within the scope of the injunction.

In order to meet the Article III "case or controversy" requirement, plaintiffs must "show that [they have] 'sustained or [are] immediately in danger of sustaining some direct injury' as the result of the challenged official conduct and the injury or threat of injury must be both 'real and immediate,' not 'conjectural' or 'hypothetical.'" *Los Angeles v. Lyons*, 461 U.S. 95, 101-02 (1983). In this case, it is beyond dispute that it is merely conjectural and hypothetical that any of the 28 attorneys general who have not initiated or threatened to bring legal actions against the plaintiff airlines will do so sometime in the near future. This is especially so here, because, particularly if the airlines have their way, it is far from clear that the various state deceptive advertising statutes even prohibit any of the current practices of the plaintiff airlines. The federal courts cannot issue injunctive relief against purely speculative harm.

In order to ensure that this Court's longstanding adherence to Article III's "case or controversy" requirement not be subverted, this Court should grant the petition and vacate the District Court's overreaching injunction.

CONCLUSION

For the foregoing reasons, the amici States respectfully request that this Court grant the writs of certiorari filed by the Attorneys General of Texas and the 31 other States.

Dated: Honolulu, Hawaii, May 20, 1991.

Respectfully submitted,

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FOR ARGUMENT

Supreme Court, U.S.
FILED
JAN 13 1992
OFFICE OF THE CLERK

No. 90-1604

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

DAN MORALES,
ATTORNEY GENERAL OF TEXAS,
Petitioner,
v.

TRANS WORLD AIRLINES, INC., *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED APRIL 16, 1991
CERTIORARI GRANTED NOVEMBER 27, 1991

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Plaintiffs' Complaint, Filed January 23, 1989_____1a

Plaintiffs' Motion for a Temporary Restraining Order, Filed January 23, 1989 [with Affidavits and Exhibits]_____25a

Defendant's Affidavit for Authentication of Business Records, Filed January 27, 1989_147a

Defendant's Original Answer, Filed February 10, 1989_____162a

Motion of Pan American World Airways, Inc. for Leave to Intervene, Filed March 15, 1989_____172a

Supplement to Plaintiffs' Motion to Broaden Injunction [Excerpt-one-page advertisement attached as Exhibit B to Exhibit A to the Supplement], Filed April 10, 1989_____198a

Order Granting Motion of Pan American World Airways, Inc. for Leave to Intervene, Signed May 26, 1989_____202a

Affidavit of Herschel T. Elkins [Excerpt from Docket Number 185], Filed July 17, 1989__203a

Reference to Appendix to Petition for Certiorari and to Appendix to Brief for the United States as Amicus Curias

The following opinions, decisions, judgments, and orders have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the printed Petition for Certiorari:

Order of the United States District Court for the Western District of Texas, Austin Division, granting Preliminary Injunction against Texas, signed January 30, 1989 ____ 48a

Order of the United States District Court for the Western District of Texas, Austin Division, clarifying Preliminary Injunction, signed February 23, 1989 ____ 51a

Order of the United States District Court for the Western District of Texas, Austin Division, broadening Preliminary Injunction to enjoin 33 additional States and to include nine additional air carriers, signed April 26, 1989 ____ 52a

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and 33 additional States, signed June 1, 1990 ____ 8a

Opinion of the United States Court of Appeals, Fifth Circuit, affirming Preliminary Injunction, filed April 3, 1990 ____ 13a

Opinion of the United States Court of Appeals, Fifth Circuit, affirming Final Judgment and Permanent Injunction, filed January 18, 1991 ____ 1a

The following materials have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the printed Brief for the United States as Amicus Curiae:

Exhibit 1 to Appendix of Exhibits accompanying Plaintiffs' Memorandum in Support of Plaintiffs' Motion for a Temporary Restraining Order, Filed January 23, 1989 __ 5a

Chronological List of Relevant Docket Entries

January 23, 1989—Plaintiffs' Complaint filed in the United States District Court for the Western District of Texas, Austin Division.

January 27, 1989—Defendant's Affidavit for Authentication of Business Records filed in the United States District Court for the Western District of Texas, Austin Division.

January 30, 1989—Order entered granting Preliminary Injunction against Texas.

February 10, 1989—Defendant's Original Answer filed in the United States District Court for the Western District of Texas, Austin Division.

February 23, 1989—Order entered clarifying Preliminary Injunction.

March 15, 1989—Motion of Pan American World Airways, Inc. for Leave to Intervene, filed in the United States District Court for the Western District of Texas, Austin Division.

April 10, 1989—Supplement to Plaintiffs' Motion to Broaden Injunction [Excerpt--one-page advertisement attached as Exhibit B to Exhibit A to the Supplement], filed in the United States District Court for the Western District of Texas, Austin Division.

April 26, 1989—Order entered broadening Preliminary Injunction to enjoin 33 additional States and to include nine additional air carriers.

May 26, 1989—Order entered granting Motion of Pan American World Airways, Inc. for Leave to Intervene.

May 26, 1989—Order entered broadening Preliminary Injunction to include one additional air carrier.

July 17, 1989—Affidavit of Herschel T. Elkins, filed in the United States District Court for the Western District of Texas, Austin Division.

April 3, 1990—Opinion of the United States Court of Appeals, Fifth Circuit, affirming Preliminary Injunction.

June 1, 1990—Order entered granting Final Judgment and Permanent Injunction against Texas and 33 additional States.

January 18, 1991—Opinion of the United States Court of Appeals, Fifth Circuit, affirming Final Judgment and Permanent Injunction.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

TRANS WORLD AIRLINES, INC., CONTINENTAL AIRLINES, INC., and BRITISH AIRWAYS PLC, Plaintiffs,	§	
v.	§	CIVIL ACTION NO. A-89-CA-067
JIM MATTOX, Attorney General of the State of Texas, Defendant.	§	

COMPLAINT

Plaintiffs Trans World Airlines, Inc. ("TWA"), Continental Airlines, Inc. ("Continental") and British Airways Plc ("British Airways"), by their attorneys, allege for their complaint on knowledge as to themselves and their owr acts and on information and belief as to all other matters, as follows:

THE PARTIES

1. Plaintiff TWA is a corporation organized and existing under the laws of Delaware with its principal place of business at Mount Kisco, New York. As a certificated air carrier, TWA is subject to extensive regulation concerning routes, fares and services by the United States Department of Transportation ("DOT"). TWA advertises its routes, rates and services in newspapers, on radio or television, and in other media available to the public.

2. Plaintiff Continental is a corporation organized and existing under the laws of Delaware with its principal place of business at Houston, Texas. As a certificated air carrier, Continental is subject to extensive regulation concerning rates, routes, and services by the DOT. Continental advertises its rates, routes, and services in newspapers, on radio or television, and in other media available to the public.

3. Plaintiff British Airways is a corporation organized and existing under the laws of England and Wales with its principal place of business at Heathrow Airport in Hounslow, Middlesex, England. As a holder of a foreign air carrier permit, British Airways is subject to extensive regulation concerning rates, routes, and services by the DOT. British Airways advertises its rates, routes, and services in newspapers, on radio or television, and in other media available to the public.

4. Defendant Jim Mattox is the Attorney General of the State of Texas and is sued in his official capacity. The Attorney General is responsible for enforcing the various provisions of Texas law at issue herein.

JURISDICTION AND VENUE

5. This action arises under the Supremacy Clause, Commerce Clause, Compact Clause and the First Amendment of the Constitution of the United States, the Federal Aviation Act of 1958, as amended, 49 U.S.C. §§1301 et seq. (the "Federal Aviation Act"), and the regulations and orders promulgated thereunder by the DOT, and is therefore within the jurisdiction of this Court pursuant to 28 U.S.C. §§1331 and 1337.

6. Venue is properly laid before this Court pursuant to 28 U.S.C §1391 because Attorney General Mattox is a resident of and maintains his office in this district and because Plaintiffs' claims for relief arose in this district. Attorney General Mattox, in concert with numerous other states' attorneys general, has acted through the National Association of Attorneys General (NAAG) to develop and issue NAAG's Air Travel Industry Enforcement Guidelines ("Guidelines"). The threatened enforcement of these Guidelines by Attorney General Mattox, on behalf of himself and other attorneys general in concert, gives rise to this Complaint.

NATURE AND BACKGROUND OF THIS ACTION

7. This is an action for: (i) a declaratory judgment, pursuant to 28 U.S.C. §2201, declaring that any threatened implementation or enforcement of the Guidelines through Texas Bus. & Com. Code §§17.41 et seq., against plaintiffs is unconstitutional insofar as applied to plaintiffs' conduct relating to rates, routes or services, including their advertising and marketing practices relating thereto, with specific reference to the advertisement of fuel, tax and other surcharges; and (ii) preliminary and permanent injunctive relief, pursuant to 28 U.S.C. §2202 and this Court's inherent equitable powers, enjoining and restraining the implementation of the Guidelines by or on behalf of or in concert with the Attorney General of Texas through enforcement of Texas Bus. Com. Code §17.41 et seq., with respect to Plaintiffs' conduct relating to rates, routes or services, including their advertising and marketing practices relating

thereto, with specific reference to the advertisement of fuel, tax and other surcharges.

8. Pursuant to the Federal Aviation Act, the DOT and its predecessor, the Civil Aeronautics Board ("CAB"), promulgated extensive rules and regulations governing activities related to air transportation by air carriers and foreign air carriers. These extensive federal rules and regulations relate, inter alia, to unfair and deceptive practices in the airline industry, including standards governing price advertising.

9. Congress expressly granted the CAB the authority to promote the public interest through the "prevention of unfair, deceptive, predatory, or anticompetitive practices in air transportation . . . ." 49 U.S.C. §1302(a)(7). Not only did Congress specifically prohibit such practices, it further authorized the CAB in Section 411 of the Federal Aviation Act to determine whether any air carrier or foreign air carrier "has been or is engaged in unfair or deceptive practices or unfair methods of competition in air transportation or the sale thereof." 49 U.S.C. §1381. In the event that the CAB finds that a carrier "is engaged in such unfair or deceptive practices or unfair methods of competition, it shall order such air carrier to cease and desist . . . ." Id.

10. Also, in amending the Federal Aviation Act by the Airline Deregulation Act of 1978, Pub. L. 95-504, 92 Stat. 1705, Congress provided in Section 105, 49 U.S.C. §1305, that "no State . . . shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes or services of any [interstate] air carrier." 49 U.S.C. §1305(a)(1).

11. Acting pursuant to Congressional authorization, the CAB promulgated regulations governing unfair, deceptive, predatory or anti-competitive practices, 14 C.F.R. Part 399, and particularly pertaining to price advertising, 14 C.F.R. §399.84. Because the Airline Deregulation Act of 1978, supra, would otherwise have limited substantially CAB and DOT authority over unfair or deceptive practices related to air transportation beginning in 1985, Congress acted affirmatively in the CAB Sunset Act of 1984, P.L. No. 98-443, 98 Stat. 1703, to reserve all federal authority over these practices. In the CAB Sunset Act, 49 U.S.C. §1551, Congress transferred "the CAB's authority under Section 411 of the [Federal Aviation] Act, to prevent unfair or deceptive practices" to the DOT. H.R. Rep. Conf. No. 98-1025, 98th Cong., 2d Sess. 15, reprinted in 1984 U.S. Code & Admin. News 2857, 2876. Congress' explicit reason for deciding that "there should continue to be authority in the Federal government to protect consumers against unfair and deceptive practices" was, inter alia, that such Federal Aviation Act authority:

> insures a uniform system of regulation and preempts regulation by the states. If there was no Federal regulation, the states might begin to regulate these areas, and the regulations could vary from state to state. This would be confusing and burdensome to airline passengers, as well as to the airlines.

H.R. Rep. No. 98-793, 98th Cong., 2d Sess. 4, reprinted in 1984 U.S. Code Cong. & Admin. News 2857, 2860.

12. On information and belief, NAAG is a voluntary association comprised of representatives of the attorneys general of the fifty states, the District of Columbia, and of various territories. In June 1987, defendant Attorney General Jim Mattox co-sponsored a resolution directing the appointment of a NAAG task force to study the advertising and marketing practices of the airline industry in the United States. The task force was directed to recommend a course of action to NAAG members with respect to alleged consumer concerns in the areas of airline advertising practices, frequent flyer programs, and compensation for denied boarding.

13. The NAAG task force subsequently developed the Guidelines, which purportedly address advertising and marketing practices in the airline industry. (A copy of the NAAG Guidelines is attached as Exhibit "1" in the separately bound Appendix of Exhibits (hereinafter "Appendix") that accompanies this Complaint and Plaintiffs' Memorandum in Support of Plaintiff's Motion for Temporary Restraining Order). According to NAAG, the Guidelines did not establish new laws but were intended to serve as "prosecution guidelines to be used by the states in interpreting their own laws."

14. In September 1987, NAAG circulated a draft of its proposed Guidelines to major airlines, the DOT, and the United States Federal Trade Commission ("FTC"). The comments received from these entities recommended against adoption of the Guidelines. For example, the FTC stated that the task force should refrain from recommending the draft Guidelines and reminded NAAG that the "Federal Aviation Act specifically preempts state regulation of

airline rates, routes, or services." Appendix, Exhibit "2" at 2. Similarly, the DOT, in a letter from its General Counsel dated October 19, 1987, stated that "a number of the recommendations appear to be preempted by the Federal Aviation Act (49 U.S.C. §1301 et seq.) or Department of Transportation (DOT) rules or would unduly burden interstate commerce." Appendix, Exhibit "8" at 1.

15. Notwithstanding these objections, on or about December 12, 1987, NAAG adopted final enforcement Guidelines, stating that they would "serve to advise the airline industry which conduct is permitted and what is prohibited."

16. The Guidelines cover three principal areas. First, they require all advertisements of fares to disclose in a prominent fashion all material conditions connected with the purchase of tickets, specify the manner in which such disclosures should be made, and require that airlines make available a sufficient number of seats on each flight to meet reasonably anticipated demand for any advertised fares. Second, the Guidelines purport to regulate certain terms and conditions of frequent flyer programs. Finally, the Guidelines direct airlines to disclose all terms and conditions of incentives offered to induce passengers to give up their seats on overbooked flights.

17. Although the Guidelines themselves do not have the force of law, NAAG considers them to be interpretations of already existing state laws dealing with unfair and deceptive practices. Indeed, NAAG has asserted that the Guidelines represent "minimally necessary" regulatory requirements. Subsequently, various state attorneys general acting

in concert have taken the position that the Guidelines are proper interpretations of their existing state laws and that they will implement or enforce the Guidelines against air carriers through their various state laws.

18. Following actions by a number of state attorneys general seeking to enforce compliance with the full price advertising and roundtrip pricing sections of the Guidelines, the DOT, acting through its general counsel, sent a letter dated March 2, 1988, to Attorney General Jim Mattox indicating that "[b]oth of these matters are clearly preempted by Federal law." Appendix, Exhibit "9" at 1. The DOT noted that, applying Sections 204 and 411 of the Federal Aviation Act, 49 U.S.C. §§1324, 1381, the CAB adopted a rule that requires full price advertising for all components of the advertised air transportation. Since assuming jurisdiction from the CAB for this rule, the DOT has specifically permitted the type of advertising to which the Guidelines object.

19. One state attorney general who has indicated his intent to take enforcement action implementing the Guidelines' fare advertising provisions is defendant Jim Mattox, the Attorney General of the State of Texas. Acting in his official capacity and in concert with other state attorneys general, Attorney General Mattox, through authorized agents of the Office of the Attorney General of Texas, has threatened to institute enforcement proceedings against plaintiffs if their advertising practices do not conform to the Guidelines. Specifically, on November 14, 1988, Stephen Gardner, Assistant Attorney General of the State of Texas, acting on behalf of the States of Texas, California, Massachusetts, New York, and

Washington, wrote a letter to various airlines, including plaintiffs, to reaffirm the position of such states that "any fuel, tax, or other surcharge to a fare must be included in the total advertised price of the fare." (Copies of Mr. Gardner's substantially identical letters to plaintiffs TWA, Continental, and British Airways are attached to the Affidavits of Tracy Britton, John Power, and John Williams, which are Exhibits B, E and G, respectively, to Plaintiffs' Motion for Temporary Restraining Order, which accompanies this Complaint.) Although Mr. Gardner's letter does not expressly refer to the Guidelines, the letter duplicates section 2.5 of the Guidelines, which states that "[a]ny fuel, tax, or other surcharge to a fare must be included in the total advertised price of the fare." (Id.) Thus, it is clear that Attorney General Mattox seeks to implement or enforce section 2.5 of the Guidelines through state law.

20. Mr. Gardner's letter indicated that, absent alteration of the advertising, the states would initiate enforcement actions under their respective state laws. It also stated that to allow time to bring the challenged advertising into compliance, no action would be taken until after November 30, 1988, and that any advertisement which appears prior to December 1, 1988, would not be the subject of legal action unless a so-called "deceptive" advertisement appears on or after December 1. Mr. Gardner described his letter as a "formal notice of intent to sue" and as "the final opportunity to cure your [alleged] violation of the state laws." (Id.)

FIRST CLAIM FOR RELIEF

(Preemption by the Federal Aviation Act, as amended)

21. Plaintiffs repeat and reallege paragraphs 1-20 as if fully set forth herein.

22. Section 105(a) of the Federal Aviation Act, 49 U.S.C. §1305(a)(1), as amended by the Airline Deregulation Act of 1978, supra, expressly preempts any state law, rule or regulation relating to airline rates, routes or services. It provides in pertinent part:

> [N]o state . . . shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier having authority under subchapter IV of this Act to provide interstate air transportation.

23. Congress' purpose in enacting Section 105 was to prevent conflicts and inconsistent state regulations from being imposed on air carriers and to preclude the states from impeding Congress' decision to deregulate the airline industry. Congress' express intent was to encourage, develop and attain a uniform air transportation system which relies on competitive market forces to determine the quality, variety and price of airline services. To promote uniformity, the DOT was given the sole responsibility for regulating air carriers in any matters relating to routes, rates or services. Because of the DOT's expertise in air transportation matters, Congress vested it with exclusive authority to administer all consumer-related functions in these enumerated areas.

24. Additionally, Section 411 of the Federal Aviation Act prohibits deceptive or unfair practices and specifically authorizes the DOT, as the CAB's successor, to:

> investigate and determine whether any air carrier, foreign air carrier, or ticket agent has been or is engaged in unfair or deceptive practices or unfair methods of competition in air transportation or the sale thereof. If the Board shall find, after notice and hearing, that such air carrier, foreign air carrier, or ticket agent is engaged in such unfair or deceptive practices or unfair methods of competition, it shall order such air carrier, foreign air carrier, or ticket agent to cease and desist from such practices or methods of competition.

49 U.S.C. §1381(a) (Section 411).

25. In the CAB Sunset Act of 1984, Congress transferred the CAB's existing authority under Section 411 to the DOT. 49 U.S.C. 1551(b). Congress confirmed that such authority was intended to "insure[ ] a uniform system of regulation and preempts regulation by the states." H.R. Rep.98-793, 98th Cong., 2d Sess. 4, reprinted in 1984 U.S. Code Cong. & Admin. News 2857, 2860.

26. The DOT has enforced Congress' preemption in Section 105 by regulating all economic factors that go into the provision of a quid pro quo for passengers' fares, such as flight frequency and timing, liability limits, reservation and boarding practices, insurance, smoking rules, meal service, entertainment, bonding and corporate financing. The

DOT also has expressly indicated that it intends to occupy this field completely pursuant to Congress' direction in Section 105.

27. The DOT has also consistently exercised its enforcement authority under Section 411. Likewise, the DOT, through its General Counsel, has interpreted Section 411 and its implementing regulations, 14 C.F.R. Part 399 and DOT Orders 85-12-68, 88-3-25, and 88-8-2, as preempting regulation by the states of allegedly deceptive or unfair price advertising practices covered by the Guidelines. (Certified copies of the referenced DOT orders appear in the Appendix as Exhibits "5", " 6", and " 7", respectively .)

28. The NAAG Guidelines directly conflict with Congressional action and intent by seeking to regulate an airline's allegedly deceptive advertising of its rates, routes and services . See 14 C.F.R. §399. 84 (1988); DOT Orders 85-12-68, 88-3-25 and 88-8-2. (Appendix Exhibits "5", "6", and "7.") Therefore, the Guidelines and any threatened enforcement actions are expressly preempted by federal law.

29. The three broad areas which are covered by the Guidelines -- fare advertising, frequent flyer programs, and denied boarding compensation -- and which Attorney General Jim Mattox is threatening to enforce through Texas Bus. & Com. Code §§17.41 et seq. are all directly related to price advertising, 14 C.F.R. §399.84, and are integrally "related to rates, routes and services." Indeed, NAAG has expressly acknowledged that one likely effect of the Guidelines will be to cause airlines to eliminate substantive conditions associated with discount fares because of

the onerous and unlawful disclosure requirements which the Guidelines impose. Furthermore, given the Guidelines' complicated disclosure requirements, it is likely that airlines will place less broadcast advertising of their air fares than is now the case. The consequential loss of the ability to effectively publicize fare reductions will remove airlines' incentive to cut fares. Thus, Sections 105 and 411 mandate the preemption of the Guidelines as they are enforced through state law, including Texas Bus. & Com. Code §§17.41 et seq.

30. Even absent Sections 105 and 411, the Guidelines construed in conjunction with Texas and other state law are preempted due to the uniform federal regulatory scheme that governs airline advertising, particularly of international rates, routes and services. The scheme of federal regulation leaves no room for supplementary state regulation of allegedly deceptive advertising of an airline's rates, routes and services.

31. The Federal Aviation Act, as amended, and the DOT's implementing regulations, interpretations and practices, comprehensively deal with fare advertising, frequent flyer programs and denied boarding compensation. State enforcement activity in the areas that attempt to dictate acceptable modes of business activity by the plaintiffs cannot co-exist with federal law on the same subjects, because it stands as an obstacle to implementing Congress' express decision to deregulate the domestic industry as a matter of national policy.

32. Certain provisions of the Guidelines as construed in conjunction with Texas state law are preempted for the additional reason that they conflict

in words or in effect with existing federal law. Specifically, pursuant to the requirements of international agreements between the United States and other sovereign nations, and of Section 403 of the Federal Aviation Act, 49 U.S.C. §1373, plaintiffs must file tariffs for their foreign flight schedules:

> Every air carrier and every foreign air carrier shall file with the Board, and print, and keep open to public inspection, tariffs showing all rates, fares, and charges for air transportation between points served by it . . . . Tariffs shall be filed, posted, and published in such form and manner, and shall contain such information, as the Board shall by regulation prescribe . . . .

49 U.S.C. §1373. Thus, tariffs are expressly required by federal law and permitted to be advertised by Section 403. However, because the tariffs list separately the component parts of the air fares, the Guidelines would prohibit their advertisement contrary to express requirements of federal law. Also, subsections 2.5 and 2.6 of the Guidelines require surcharges to be included in the total price advertised and prohibit the advertisement of one-way fares based on a roundtrip purchase only. Those subsections are in direct conflict with 14 C.F.R. §399.84 and DOT interpretations thereunder such as Orders 85-12-68, 88-3-25 and 88-8-2 (Appendix, Exhibits "5", "6", and "7"), which expressly permit such advertising practices. Indeed, the entire effect of Section 2 of the Guidelines is to decrease or eliminate price competition by airlines, competition which is essential to the success, and indeed is the paramount

goal, of the deregulated air transportation market mandated by the Federal Aviation Act, as amended.

33. Under the Supremacy Clause of the United States Constitution, the Guidelines construed in conjunction with Texas Bus. & Com. Code §§17.41 et seq. or with any other states' laws, are unconstitutional and may not be enforced against plaintiffs.

34. Plaintiffs are incurring unascertainable but real costs and competitive disadvantages by complying with the Guidelines under duress. To the extent the Guidelines restrict advertisements that are expressly required or permitted by Federal statute and regulation, they constitute an impermissible infringement of constitutional rights protected by the Supremacy Clause. Plaintiffs have no adequate remedy at law and have been and will continue to be directly and irreparably harmed if an injunction is not issued.

SECOND CLAIM FOR RELIEF

(Violation of Commerce Clause)

35. Plaintiffs repeat and reallege paragraphs 1-34 as if fully set forth herein.

36. Plaintiffs are involved in interstate commerce and also engage in foreign commerce. They engage in the advertising of their services in the various states and have customers who purchase their services in the various states and internationally.

37. Implementation or enforcement of the Guidelines through various state laws, including Texas Bus. & Com. Code §§17.41 et seq., and as

applied to plaintiffs' interstate and international activities, imposes direct and excessive burdens on foreign and interstate commerce.

38. Unless the Court acts to restrain the threatened enforcement against plaintiffs of Texas Bus. & Com. Code §§17.41 et seq., as construed in accordance with the Guidelines, plaintiffs will be faced with undue and impermissible burdens on their ability to engage in interstate and foreign commerce as a result of the potential for contradictory regulatory obligations imposed by states whose standards differ, or may differ, from those of Texas.

39. Plaintiffs now will be subject to multi-tiered regulations, with conflicting demands imposed by the DOT, the State of Texas and a possible multitude of conflicting state regulations caused by the differing interpretation of the Guidelines by other NAAG members. For example, the Attorney General of New York has a different interpretation from Attorney General Mattox, and another NAAG member, the Attorney General of New Mexico, objects to the Guidelines. Such varying enforcement positions by the NAAG members run counter to Congress' intention of avoiding confusion and inconsistent regulation of the airline industry by providing the DOT with pre-emptive authority in this area.

40. Moreover, to the extent that plaintiffs can run advertisements in compliance with all the different laws of the various states, the exacting detail the Guidelines require to be disclosed will cause the number of such advertisements to decline. This, in turn, will decrease price competition in the industry,

a result directly contrary to Congress' stated national policy, as embodied in the Airline Deregulation Act of 1978.

41. Wholly apart from the issue of the potential for conflicting or differing interpretations of the Guidelines, threatened enforcement action by a single large state, such as Texas, will inevitably have interstate effects. Because it is impossible as a practical matter for plaintiffs to tailor advertisements disseminated through interstate media to meet individual state requirements, a single state will inevitably coerce plaintiffs into conforming their national advertising and marketing practices to those requirements; ultimately, such conformance will be to the requirements imposed by the most restrictive jurisdiction.

42. In addition to the adverse effects on interstate commerce which are posed by the threatened actions of Attorney General Mattox under the NAAG Guidelines, there is also the threat of a serious disruption of foreign commerce. By attempting to regulate the manner in which both foreign and domestic airlines provide and market their air transportation services, Attorney General Mattox is intruding into matters involving the foreign commerce and foreign relations of the United States.

43. The regulatory scheme for international aviation involves a complex combination of federal statutes and international agreements, including over eighty treaties and executive agreements between the United States and other sovereign nations. Because international aviation is governed by treaty and executive agreements, there is always

the possibility of a conflict between these international agreements and U.S. domestic law, and of friction between the United States and foreign governments should domestic laws be applied inconsistently with the requirements of the United States' international obligations. Congress has recognized this possibility and addressed the problem by directing that U.S. laws and regulations be applied consistently with international agreements. See 49 U.S.C. §1502(a). Furthermore, Congress has reserved for the President the exclusive right to disapprove actions by the regulatory authorities, such as rejection of international tariffs, that might disrupt the foreign relations of the United States. See 49 U.S.C. §1461(b).

44. In the area of international relations and the regulation of foreign trade and commerce, the federal government of the United States must speak with a single voice and act through a single government. Under Article I of the United States Constitution, Congress has the exclusive and plenary power to regulate commerce with foreign nations. Through the Federal Aviation Act of 1958, as amended, Congress has delegated this authority in the area of air transportation to the President and the DOT. They alone may speak for the nation. Consequently, the actions of Attorney General Mattox in threatening to implement and enforce the Guidelines under the Texas law have been taken in derogation of the Constitutional allocation of power to the central government to regulate foreign commerce.

45. Under the Commerce Clause and the Supremacy Clause of the United States Constitution, Texas Bus. & Com. Code §§17.41 et seq., and any other states' laws construed in conjunction with the

Guidelines, are unconstitutional as applied to plaintiffs and may not be enforced. The pertinent Texas statutes (and any other state laws) construed in accordance with the Guidelines impose an unreasonable and impermissible burden on the flow of interstate and foreign commerce and unreasonably and impermissibly regulate and affect plaintiffs' conduct in such states.

46. Plaintiffs have been threatened with an enforcement action by the Attorney General of Texas and by other states' attorneys general acting in concert with him, unless plaintiffs comply with the Guidelines. To the extent that plaintiffs are complying with this unconstitutional assertion of power, they are doing so under duress and have been and will continue to be immediately and irreparably harmed for so long as this threat continues. Plaintiffs have no adequate remedy at law.

THIRD CLAIM FOR RELIEF

(Violation of Interstate Compact Clause)

47. Plaintiffs repeat and reallege paragraphs 1-46 as if fully set forth herein.

48. The Compact Clause of the U.S. Constitution states in pertinent part as follows:

> No State shall, without the Consent of Congress, . . . enter into any Agreement or Compact with another State . . .

U.S. Const. art. I, § 10, cl. 3.

49. The actions of the Attorney General of the State of Texas and the other members of NAAG in their concerted activities in developing, issuing,

and agreeing to enforce the Guidelines through their own states' laws constitute the formation of an illegal agreement or compact among the states. The compact is illegal because it has the effects of both increasing the political power of the states and encroaching substantially on national and international interests that are the exclusive domain of the federal government. Enforcement of the Guidelines clearly encroaches on federal authority "to protect consumers against unfair and deceptive practices" in the air travel industry, as set forth in the legislative history accompanying the CAB Sunset Act of 1984, Pub. L. No. 98-443. H.R. Rep. No. 98-793, 98th Cong., 2d Sess. 4, reprinted in 1984 U.S. Code Cong. & Admin. News 2857, 2860. Congress has not consented to these concerted actions of the states, acting through their respective attorneys general. Because the Guidelines seek to enhance the states' authority quoad the federal government, they violate the Compact Clause.

50. Plaintiffs are being irreparably injured as a result of defendant's illegal and unconstitutional interstate compact. Plaintiffs have no adequate remedy at law. Consequently, plaintiffs are entitled both to a declaration that the Guidelines are void and unenforceable, and an injunction preventing any attempt by the Attorney General of Texas, or any NAAG member in active concert or participation with him, from enforcing the Guidelines through their state laws.

FOURTH CLAIM FOR RELIEF

(Violation of First Amendment)

51. Plaintiffs repeat and reallege paragraphs 1-50 as if fully set forth herein.

52. Commercial speech is protected against governmental suppression or undue regulation by the First Amendment of the United States Constitution.

53. If commercial speech concerns a lawful activity and is not inherently misleading or fraudulent, the government may not restrict the manner, form and content of commercial speech unless the government's interest in doing so is substantial, the restrictions directly advance the government's asserted interests, and the restrictions are no more extensive than necessary to serve that interest.

54. Plaintiffs' fare advertisements and other promotional and informational material are commercial speech. That information concerns a lawful activity -- the provision of airline services -- and is not inherently misleading or fraudulent since it is in conformity with the Orders of the DOT, the federal agency vested with exclusive jurisdiction over consumer protection issues in the airline industry.

55. Neither the state of Texas, nor any other state whose attorney general is actively in concert with Attorney General Mattox, has any cognizable interest in restricting and dictating the manner, form and content of plaintiffs' commercial speech through the application of its respective state laws, including

Texas Bus. & Com. Code §§17.41 et seq., as construed in accordance with the Guidelines. To the extent that there are substantial government interests in regulating, plaintiffs commercial speech, Congress has delegated the sole responsibility for such regulation to the DOT. In any event, the means of regulation which Texas and its companion states have chosen do not directly advance Texas' or any other states' purported interest.

56. Most importantly, the restrictions and dictates that Texas and other states are trying to force plaintiffs to adhere to under threat of enforcement proceedings are overbroad and far more extensive than are necessary to serve any legitimate Texas state interest. The threatened application of Texas' and other states' laws to plaintiffs in this regard constitutes an unlawful prior restraint and is therefore violative of the First Amendment.

57. The per se rules set forth in the Guidelines bear no necessary relationship to whether an advertisement is, in fact, false and deceptive. The Texas Deceptive Trade Practices Act, Texas Bus. & Com. Code §§17.41 et seq., as construed by Attorney General Mattox in conjunction with the Guidelines, is overbroad and fails to adhere to the constitutional requirement that it be no more extensive than necessary to serve the government's interest in regulating commercial speech; in this case, a non-existent interest.

58. Plaintiffs' constitutionally protected rights to engage in commercial speech have been and are being illegally chilled and restricted. To the extent that plaintiffs are complying with this unconstitutional assertion of power, they are doing

so under duress and have been and will continue to be immediately and irreparably harmed for so long as this continues unchecked. Plaintiffs have no adequate remedy at law.

WHEREFORE, plaintiffs demand that judgment be entered:

(a) declaring that implementation or enforcement of section 2.5 of the Guidelines through Texas Bus. & Com. Code §§17.41 et seq. or any other state law is unconstitutional as applied to plaintiffs under the Supremacy Clause of the United States Constitution, Article VI, cl. 2;

(b) declaring that implementation or enforcement of section 2.5 of the Guidelines through Texas Bus. & Com. Code §§17.41 et seq. or any other state law is unconstitutional as applied to plaintiffs under the Commerce Clause of the United States Constitution, Article I, § 8, cl. 3, because those laws impose an impermissible burden on interstate and foreign commerce;

(c) declaring that implementation or enforcement of section 2.5 of the Guidelines through Texas Bus. & Com. Code §§17.41 et seq. or any other state law is unconstitutional as applied to plaintiffs under the Compact Clause of the United States Constitution, Article I, § 10, cl. 3, because such implementation or enforcement would be the result of an illegal interstate compact that has not been approved by Congress;

(d) declaring that implementation or enforcement of section 2.5 of the Guidelines through Texas Bus. & Com. Code §§17.41 et seq. or any other state law is unconstitutional as applied to plaintiffs

under the First Amendment of the United States Constitution, because these laws impermissibly restrict constitutionally protected commercial speech;

(e) preliminarily and permanently enjoining the Attorney General of the State of Texas, Jim Mattox, and all other persons acting for or in active concert or participation with the Attorney General or the State of Texas, from taking any action against plaintiffs pursuant to Texas Bus. & Com. Code §§17.41 et seq. or any other state law in conjunction with the NAAG Guidelines as they purport to regulate plaintiffs' rates, routes or services, or plaintiffs' marketing or plaintiffs' advertising of their rates, routes and services;

(f) granting plaintiffs the costs and disbursements of this action, including attorney's fees; and

(g) granting such other and further relief as the Court deems just and proper.

[Signatures omitted in printing.]

[Title omitted in printing.]

PLAINTIFFS' MOTION FOR A TEMPORARY RESTRAINING ORDER

Plaintiffs Trans World Airlines, Inc., Continental Airlines, Inc., and British Airways Plc hereby move this Court to issue a temporary restraining order under Rule 65 of the Federal Rules of Civil Procedure, enjoining defendant Jim Mattox, Attorney General of the State of Texas, his agents, servants, employees, and attorneys, and any person in active concert or participation with him, from filing or otherwise instituting any enforcement action under the laws of the state of Texas which would prevent plaintiffs' advertisement of airline fares in a manner consistent with federal law and regulations, including applicable orders and regulations of the U.S. Department of Transportation ("DOT") or its predecessor agencies.

Plaintiffs would show that Attorney General Mattox, in concert with the attorneys general of various other states in the National Association of Attorneys General ("NAAG"), developed and issued Air Travel Industry Enforcement Guidelines ("Guidelines") purporting to govern the airline industry, despite objections from the DOT and the U.S. Federal Trade Commission that implementation of such Guidelines was unconstitutional and would cause confusion to the public, impede competition, and burden commerce. Nevertheless, NAAG finalized the Guidelines and defendant Attorney General Mattox, acting in his official capacity and also on behalf of other members of NAAG, has threatened to implement the Guidelines through the enforcement of state law.

Plaintiffs' motion rests on the substantial likelihood that they will prevail on the merits of their case. Specifically, and in support of this conclusion, plaintiffs state that: (1) they are certificated air carriers and foreign air carriers subject to regulation by the DOT pursuant to its authority under the Federal Aviation Act, as amended; (2) in Section 105(a) of the Federal Aviation Act, 49 U.S.C. 1305(a)(1), Congress has expressly preempted any state regulation "relating to rates, routes, or services" of interstate air carriers; (3) under Section 411 of the Federal Aviation Act, 49 U.S.C. § 1381(a), DOT has full authority to "investigate and determine whether any air carrier [or] foreign air carrier. . . .has been or is engaged in unfair or deceptive practices or unfair methods of competition in air transportation or the sale thereof"; (4) DOT has consistently exercised its enforcement authority under Section 411 and has interpreted Section 411 and its regulations as preempting any state regulation of allegedly deceptive advertising of an airline's rates, routes or services; (5) the NAAG Guidelines unlawfully intrude into the domain of federal law by implementation and enforcement through various states' laws; (6) defendant Attorney General Mattox's threatened implementation of the Guidelines, particularly subsection 2.5, through state law directly conflicts with federal regulations, 14 C.F.R. Parts 221 and 399, and DOT orders, Orders 85-12-68, 88-3-25 and 88-8-2, by requiring plaintiffs to include surcharges in the total price advertised, which federal law specifically permits to be listed separately; and (7) despite federal preemption, defendant Attorney General Mattox, in his official capacity and on behalf of other members of NAAG, has threatened the imminent implementation of the Guidelines

through state law by filing enforcement proceedings against plaintiffs if they do not conform their advertising to the NAAG Guidelines, particularly subsection 2.5. Such threatened implementation and enforcement of the Guidelines through state law contravenes the Supremacy Clause of the United States Constitution.

Moreover, plaintiffs state that the threatened enforcement of the Guidelines by the Attorney General of Texas, or by other states' attorney generals in active concert or participation with him, imposes an undue burden on interstate and foreign commerce in violation of the Commerce Clause; an illegal agreement or compact between states in violation of the Compact Clause (Article I, § 10, cl. 3 of the United States Constitution); and an impermissible restriction on plaintiffs' rights of commercial speech in violation of the First Amendment. Plaintiffs will have a substantial likelihood of success on the merits of these arguments.

Because of the imminent threat of enforcement action by Attorney General Mattox and others in active concert or participation with him, issuance of a temporary restraining order is necessary prior to the hearing on plaintiffs' motion for declaratory and injunctive relief in order to prevent irreparable harm to plaintiffs. Plaintiffs face irreparable harm by the threatened unconstitutional acts of defendant and by the loss of revenues and customers to other carriers in the airline industry which would result from these acts. Plaintiffs also face the lack of an adequate remedy at law, since plaintiffs' damages flowing from enforcement of the Guidelines can not be predicted, ascertained or even

approximated. There is no potential injury to the defendant that would militate against the granting of a temporary restraining order, and the public interests in free competition, the dissemination of information and advertising, and the continued vitality of a unified federal regulatory regime for the air travel industry will be served by the requested injunctive relief.

This motion for temporary restraining order is based upon the affidavits of (1) Samuel Podberesky, (2) Tracy Britton, (3) Vivian Caudle, (4) Bruce O'Brien, (5) John Power, (6) Jean Zelkovitch, and (7) John Williams, attached hereto as Exhibits A, B, C, D, E, F, and G, respectively, and incorporated herein by reference. Also attached as Exhibit H is a certified copy of the Affidavit of Attorney General Mattox filed in Alaska, et al. v. United States Dep't of Transp., Nos. 88-1348 and 88-1682 (D.C. Cir. filed May 6, 1988) (challenging the propriety of DOT's Orders 88-3-25 and 88-8-2).

Plaintiffs further rely upon the Memorandum in Support of Plaintiffs' Motion for a Temporary Restraining Order and the separate Appendix of Exhibits that accompanies and is being filed contemporaneously with plaintiffs' motion and memorandum in support.

Plaintiffs have filed a proposed Temporary Restraining Order and hereby request and pray that this Court grant the relief requested in such proposed order.

[Signatures omitted in printing.]

[Exhibit A to
Motion for Temporary Restraining Order]

[Title omitted in printing.]

AFFIDAVIT OF SAMUEL PODBERESKY

BEFORE ME, the undersigned authority, personally appeared Samuel Podberesky, who being by me sworn, deposes and states as follows:

1. My name is Samuel Podberesky. I am over the age of 21 years, have never been convicted of a crime, and have personal knowledge of all the facts and opinions contained herein.

2. I am the Assistant General Counsel for Aviation Enforcement and Proceedings of the U.S. Department of Transportation. In this position I have primary legal responsibility for the enforcement of the Department's economic regulations affecting air transportation and related statutory provisions. My office is assisted in that function by the Consumer Office within the Office of the Assistant Secretary for Government Affairs. I have been in my current position since March 1986.

3. Among the enforcement matters with which my office deals are cases involving actual or potential violations of section 411 of the Federal Aviation Act, 49 U.S.C. §1381, which prohibits deceptive advertising. In carrying out this enforcement function, my office is assisted by the policy guidance contained in 14 C.F.R. Part 399. For example, 14 C.F.R. §399.81 indicates that enforcement action may be taken pursuant to section 411 for unrealistic scheduling of flights. Similar enforcement action may be taken in accordance with

section 399.88 for failures by airlines to disclose code-sharing arrangements to customers.

4. 14 C.F.R. §399.84 provides policy guidance on airline price advertising. In this connection, since June 1987 the Department has issued a number of enforcement orders at my office's behest directing tour operators and air carriers to cease and desist from deceptive advertising (including deceptive price advertising) and to pay civil penalties. See *e.g.*, Orders 88-4-63, 88-4-33, and 87-6-6.

5. When I assumed my current position, section 399.84 had been in effect for several years and Order 85-12-68 (December 24, 1985) had been in effect for several months. Order 85-12-68 provides that the U.S. departure tax imposed by 26 U.S.C. §4261(c) could under specified conditions be stated separately from the airfare in price advertisements. (A copy of that order is attached as Exhibit A to this Affidavit).

6. During 1986, the Department's Consumer Office, which regularly review air travel advertisements, informed me that some airlines had been listing newly enacted custom and immigration fees in a manner similar to the departure tax. I personally confirmed that information by reviewing a number of newspaper ads.

7. Within the Department, there was discussion as to whether enforcement action should be instituted against such practices or whether the separate listing of these fees should be allowed. My office and the Consumer Office determined to permit separate listings, on the basis that it was consistent with the rationale behind Order 85-12-68 and because the separate listings we reviewed were clearly not

deceptive. After this decision was made, carriers were advised of it informally by the staff of my office and the Consumer Office.

8. During the latter part of 1986, it became apparent that the number of surcharges were proliferating. In addition, my office became aware that such fees and surcharges were being displayed in advertisements in an inconsistent fashion, which created potential consumer confusion. For example, some ads listed a single surcharge for "fees and taxes," while others said that governmental fees were additional but did not state the amount. A few ads did not mention the fees at all.

9. In several instances, we asked carriers to revise their ads to correct the way in which they were listing surcharges. For example, several carriers were told that they could not separately list fuel surcharges for which the amounts were based on the mileage of flights, in part because passengers could not determine the total cost of the trip from the ads in question. Since we determined that the airlines in question had not knowingly acted in a manner inconsistent with a clearly stated Department policy in this regard and since the ads were corrected quickly, enforcement action was not pursued. This is consistent with our usual policy in the area of potentially misleading advertising, which focuses on obtaining compliance rather than assessing civil penalties.

10. Because of the need to provide uniform, formal guidance to the industry, work began on what was to become Order 88-3-25 sometime in late 1986 or early 1987. In view of other priorities, Order 88-3-25 unfortunately was not issued until March 1988. (A

coy of Order 88-3-25 is attached as Exhibit B to this Affidavit). However, the policy reflected in that order has been the enforcement policy applied by the Department since 1986.

11. The monitoring of airline advertisements by my office and the Department's Consumer Office indicated that during the months prior to the issuance of Order 88-3-25, most airlines were not including government-imposed fees and surcharges in the fares, displayed in their price advertisements.

12. After issuing Order 88-3-25, my office asked several airlines to correct price advertisements that had separately listed certain fuel surcharges imposed by their airlines in response to higher per gallon fuel taxes assessed by some local jurisdictions. A separate listing of such surcharges is improper because they are not imposed by a government body on passengers directly, and thus their separate listing could be deceptive. On August 1, 1988 the Department issued Order 88-8-2, a formal clarification of Order 88-3-25, in part to put all carriers specifically on notice of the Department's policy in this regard. (A copy of Order 88-8-2 is attached as Exhibit C to this Affidavit.)

[Signature and jurat omitted in printing.]

[Attachment A to Exhibit A to Motion for Temporary Restraining Order]

UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
WASHINGTON, D.C.

Issued by the Department of Transportation
on the 24th day of December, 1985

Request of the Air Transport Association of America for an exemption from 14 CFR 399.84	Docket 43585
Petition of Balair, AG, et al for emergency rulemaking and 399.80 and 399.84	Docket 43596

ORDER GRANTING EXEMPTION

On November 14, 1985, the Air Transport Association of America (ATA), on behalf of its members, filed a request for an exemption from 14 CFR 399.84, which states the Department of Transportation's policy with respect to price advertising. That section declares that any advertising of flights, tours, or component of tours must state the entire price of the flight, tour, or tour component; failure to comply is an unfair or deceptive trade practice under section 411 of the Federal aviation Act, as amended, 49 U.S.C. 1381 (the Act).[1] ATA asks for an immediate blanket exemption

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[1]When it adopted the price advertising policy statement, the Civil Aeronautics Board (CAB) also amended 14 CFR 380.30. (49 Fed. Reg. 49440 and 49438, December 20, 1984).

with respect to the rule's applicability to air-only scheduled service by direct air carriers, pending initiation of a rulemaking proceeding to amend the regulation. ATA asserts that the rulemaking proceeding conducted in this matter by our predecessor, the Civil Aeronautics Board (CAB), was inadequate to support application of section 399.84 to air-only scheduled service. ATA claims that the thrust of the rulemaking proceeding was directed at charter tour operators, not scheduled air carriers, and that the $3 U.S. departure tax was not at the center of the controversy. Accordingly, it asserts that the air carrier industry had inadequate notice that the rule would apply to air-only scheduled service. ATA further maintains that application to air-only scheduled service i not justified or sensible, because the regulation was intended to curb abuses of the charter tour industry. Logistical problems are also alleged with respect to compliance with the rule.

On November 15, 1985, a group of charter airlines and tour operators (the "Joint Petitioners")[2] filed a petition to review and amend 14 CFR 399.84 and

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Responsibility for these regulations transferred to the Department on January 1, 1985.

Part 380, which governs public charters, was amended to require that any solicitation material from a direct or indirect air carrier, or an agent of either, for a charter, charter tour or a charter tour component state the entire price to be paid by the consumer to the seller or agent for the travel purchased or component of the package. These changes were intended to reduce deceptive advertising by charter and tour operators, and direct and indirect air carriers.

[2]Balair, AG; Charter Travel Corp.; Condor Flugdienst GMBH; DER Travel Service, Inc.; German Charters, Inc.; Homeric Tours; Schwaben Int'l,; Tourlite Int'l, Inc.; Travac Tours and Charters, Inc.; and Travel Impressions, Ltd.

380.30 to the extent necessary to permit all carriers--scheduled and charter--to advertise air fare and tour prices without international departure taxes, provided such taxes are stated elsewhere within each ad and promotional material.[3] They also request interim relief to permit them to advertise in such a manner immediately. In the alternative, they ask that the current regulation be applied to all segments of the industry in a uniform manner. The Joint Petitioners assert that scheduled service operators are not including the tax in their promotional materials, as required by our rule, while the Joint Petitioners are doing so. Thus, they argue, they are at an unfair competitive disadvantage. The Joint Petitioners further state that they do not object to the purpose of the regulation, but believe that the international departure tax is not "central to the substance or spirit" of sections 380.30 and 399.84.

Responsive Filings

Donald L. Pevsner: On November 22, Donald L. Pevsner filed comments in opposition to the requests of both the ATA and the Joint Petitioners. Mr. Pevsner, whose 1982 petition concerning deceptive price advertising practices led to the changes in Parts 380 and 399, argues that the $3 international departure tax should be included in the price of all foreign and overseas air transportation. Mr. Pevsner objects to permitting the $3 fee to be placed at the bottom of an ad in small print. He also alleges that by not including the departure tax in the price, carriers are violating section 411 of the Act and, therefore,

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[3]On November 18, the Joint Petitioners submitted additional examples of carriers allegedly not in compliance with the regulation.

should be enjoined from continuing the practice. Mr. Pevsner further argues that any fee included on a passenger's ticket should be included in any advertising.

Joint Petitioners: The Joint Petitioners filed an answer to the ATA request and argue that any relief granted should apply to the entire industry, not just a portion of the industry. They disagree that the air carrier industry had insufficient notice that the rulemaking was intended to apply to all services including scheduled services, since the NPRM indicated that the rule would be applied to all.

Transamerica Airlines: Transamerica, an air carrier with both scheduled and charter operations, filed a consolidated answer expressing support for an exemption for all segments of the industry, not just scheduled carriers. Granting relief only to scheduled air carriers, Transamerica asserts, would give them a competitive advantage and, therefore, any relief should apply to all operations. Transamerica also points out that there have been no complaints about the treatment of the $3 tax in advertisements.

People Express Airlines: People Express, a scheduled carrier, supports ATA and asserts that the industry was not given adequate notice of the handling of the $3 tax during the rulemaking process. It claims that the primary thrust of the changes to Parts 380 and 399 was to curb abuses in the passenger charter and tour package industry.

People Express asserts that there is no basis to support the rule with respect to air-only scheduled service,

and that the amount in question is de minimus and regulation is not necessary to protect the public.[4]

Carefree David Travel: Carefree David, et al., filed in opposition to the ATA petition and in support of the Joint Petitioners' request.[5] Carefree also notes that the NPRM gave all carriers more than sufficient notice that the proposed rules would apply to all carriers. Carefree further argues that since, as the Department recently recognized in approving "half-round trip" advertising, consumers can distinguish between an advertisement that gives a round-trip price and one that provides a one-way price based on the purchase of a round-trip ticket, consumers similarly should be able to recognize that they must pay the additional $4 tax.[6]

Upon consideration of the petitions and answers, we have decided to grant the request of the Joint Petitioners for an exemption from sections 380.30 and 399.84 to permit the exclusion of the U.S. international departure tax from the total advertised

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[4]People Express also attached a copy of a letter it sent to the Department which questioned the applicability of the rule and the adequacy of notice. People Express did not include a copy of the response, however.

[5]Carefree David Travel Co., Inc.,; Emerald Tours, LTD.; Fantasy Holidays, Inc; Ferien-Service, LTD.; Hispanidad Holidays, Inc.; Rich International Airways, Inc.; Samson Tours, Inc.; Spanish Heritage Tours, Inc.; Spantax, S.A.; Trans National Travel, Inc.; Unitravel Corp.; and Vacation Travel Concepts, Inc.

[6]"Half-round trip" advertising enables, for example, a carrier to advertise a fare which can only be purchased as part of a round trip fare, i.e., New York to London - $99 (based on purchase of round-trip ticket).

price, provided all advertisements clearly state the amount of tax elsewhere in the ad. If the price advertised does not include the U.S. international departure tax, the ad must indicate that the fee is payable by the customer. This means that the industry is free to advertise its services in a variety of ways. This exemption should permit greater flexibility for the industry to advertise its services, while ensuring that the traveling public is informed of the charges they must pay to take advantage of the service offered. This exemption applies to all those that offer service involving the $3 tax and not just scheduled carriers.[7] However, failure to include in the total price or disclose the $3 tax separately will continue to be a violation of section 411. We do not believe that other relief, such as amending the regulation, is necessary in light of the exemption granted by this order.

We therefore reject arguments advanced by Mr. Pevsner that allowing the $3 international departure tax to be stated separately is deceptive to the consumer. It has long been a common practice in the industry to state this tax separately, and we have received no complaints from consumers indicating that they have been deceived by advertisements or promotional materials that display the $3 tax clearly but separately. Under the circumstances, we have no basis at this time to conclude that the practice has a significant potential to deceive consumers. However, as noted above, failure to disclose the tax in some

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[7]While the Department agrees with the Joint Petitioners that the scheduled carriers had adequate notice of the effectiveness of section 399.84, the exemption addresses the question on an industry-wide basis, without giving one segment a competitive advantage over another.

form will be considered a violation of section 411. This disclosure can be accomplished in a number of different ways, such as by including it in the generally-larger typeface stating the price of the trip, or by using an asterisk with a notation.

Therefore, under the authority delegated to the Assistant Secretary of Policy and International Affairs under 49 CFR 1.56, I:

1. Consolidate dockets 43585 and 43596 into docket 43585

2. Deny the petition of the Air Transport Association of America;

3. Grant the request of the Joint Petitioners for an exemption from the provisions of 14 CFR 380.30 and 399.84, so as to permit direct and indirect air carriers for scheduled and charter service and tour operators to state the United States international departure tax separately from other charges in advertisements and promotional materials provided that all such advertisements clearly state the amount of the tax elsewhere in the advertisement and indicate that it must be paid in addition to the advertised price; and

4. Except to the extent granted herein, deny all other requests in docket 43585.

By: Matthew W. Scocozza
Assistant Secretary for Policy and
International Affairs

SEAL

[Attachment B to Exhibit A to Motion for Temporary Restraining Order]

Order 88-3-25

UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, D.C.

Issued by the Department of Transportation
on the 10th day of March, 1988

SERVED MARCH 16, 1988

Amendment of exemption to allow separate listing of service fees in advertisements for air transportation. Docket 43585 43596

ORDER AMENDING EXEMPTION

On December 20, 1984, the Civil Aeronautics Board (CAB) adopted the price advertising policy statement, 14 CFR 399.84, declaring that any advertising of flights, tours, or components of tours must state the entire price of the flight, tour, or tour component; failure to comply is an unfair or deceptive practice within the meaning of section 411 of the Federal Aviation Act, as amended, 49 U.S.C. 1381 (the Act).[1]

[1] When it adopted the price advertising policy statement, the Civil Aeronautics Board (CAB) also amended 14 CFR 380.30. (49 Fed. Reg. 49440 and 49438, December 20, 1984). Responsibility for these regulations transferred to the Department on January 1, 1985. Part 380, which governs public charters, was amended to require that any solicitation material from a direct or an indirect air carrier, or agent of either, for a charter tour or a charter tour component state the entire price to be paid by the consumer to the seller or agent for the travel purchased or component of the package. These changes were intended to reduce deceptive advertising by charter and tour operators, and direct and indirect air carriers.

This order amends an exemption from that rule. The amendment allows advertisers to separately list certain service fees and taxes in advertisements as long as the amounts of each charge are listed separately or in total.

BACKGROUND

On November 15, 1985, a group of charter airlines and tour operators (Joint Petitioners)[2] filed a petition with the Department of Transportation to review and amend 14 CFR 399.84 and 380.30 to the extent necessary to permit air carriers – scheduled and charter – to advertise air fare and tour prices without international departure taxes, provided such taxes are stated elsewhere within each ad and promotional material. On December 24, 1985, the Department issued Order 85-12-68, granting an exemption from the provisions of 14 CFR 380.30 and 399.84, so as to permit direct and indirect air carriers for scheduled and charter service and tour operators to state the United States international departure tax separately from other charges in advertisements and promotional materials, provided that all such advertisements clearly state the amount of the tax elsewhere in the advertisement and indicate that it must be paid in addition to the advertised price.

[2] Balair, AG; Charter Travel Corp.; Condor Flugdienst GMBH; DER Travel Service, Inc.; German Charters, Inc.; Homeric Tours; Schwaben Int'l., Inc; Tourlite Int'l., Inc.; Travac Tours and Charters, Inc.; and Travel Impressions, Ltd.

Since the grant of the exemption in late December 1985, there has been a proliferation of other fees and charges, some suggested and imposed by airlines, but most charged for services provided by various U.S. government agencies. In some international markets, there is a security fee for each flight to the United States. In addition, the U.S. government has imposed a $5 customs fee and a $5 immigration fee, and a $1 tourism fee has been proposed for certain international flights. Some States and municipalities have imposed fuel surcharges of varying amounts to ticket charges.

For advertisers to comply literally with current provisions of sections 380.30 and 399.84, the are obligated to include the total cost of all such fees and charges in the advertised price. Advertisers find this difficult because they often advertise the each-way fare and state that roundtrip purchase is necessary to use the advertised price. However, security charges do not apply in all international markets, and immigration and custom fees apply only on the return segment of the trip. Fuel surcharges generally apply only on the flight leaving the State or city making such an assessment and not on the return.

As a result of the variety of additional fees and charges imposed on air travelers for a variety of services, advertisers are confused as to how the charges for such services must be presented (including the charges in the total advertised price for the reasons stated above) and in many instances, readers are not receiving the true picture of what their trip will cost. Some advertisers are stating the total amount of additional charges separately and identifying them as departure tax, custom fees,

immigration fees, etc. Some advertisers are stating the total additional charge separately and merely identifying it as "tax and services." Still others do not state an additional charge separately but merely include the statement that "tax and service charges are not included." Finally, some advertisers make no mention of the additional fees and charges at all. In many cases, readers are not aware of significant additional charges until after they have made their decision to travel based upon the only price stated.

AMENDMENT OF EXEMPTION

We want to continue to allow the industry the freedom to advertise its services in a variety of ways and we want to encourage open price competition. However, we must also ensure that the traveling public is informed of the total amount of charges they must pay to take advantage of services offered. We believe this can best be accomplished in a fashion similar to that involving the $3 U.S. departure tax and mandatory service packages.

We have decided to amend the exemption from sections 380.30 and 399.84 in Order 85-12-68 to permit the exclusion of foreign departure taxes (if collected by the advertiser), customs fees, immigration fees, security fees, agriculture inspection fees, tourist and fuel surcharges and any other surcharges that may be imposed by the U.S. Federal, State or local governments or foreign governments, from the total advertised price, provided all advertisements clearly identify and state the amount of the charges elsewhere in the ad, as a total or separately.

The cost of such surcharges may be included in the total advertised price. If so, the advertiser would not be required to list the charges separately but could

state that they are included. However, if the total advertised prices does not include all amounts for such charges, the cost must be stated clearly and conspicuously elsewhere in one of two ways. First, the total of the additional charges may be stated as one amount, so long as the kinds of charges covered by that amount are itemized. Or if the advertisers choose, they may state separately each of the charges provided and the individual amount for each. The ad must clearly indicate that the additional charges are payable by the customers.

As long as the charges for such services are stated and the services are identified, readers should readily know what they will pay for their complete transportation package. Separate itemization is already required for services comprising "mandatory" package supplements and other special services under our rules. Such disclosure appears to cause no particular compliance problems for advertisers, and, at the same time, we have received few complaints from consumers indicating that they have been deceived by advertisements or promotional materials that in fact identify special services and display the additional charges separately in legible type. We therefore have no basis at this time to deny adequate separate disclosure as a practical remedy to a growing travel industry problem. Nevertheless, failure to disclose all additional costs clearly and conspicuously will be considered an unfair and deceptive practice in the sale of transportation within the meaning of section 411 of the Federal Aviation Act. This disclosure can be accomplished, for example, by including the additional costs in the generally-larger typeface stating the price of the trip or by using an asterisk with a notation showing the total cost of the

additional charges with the kind of charges itemized, or the charges can be stated with each cost presented separately.

ACCORDINGLY:

1. The exemption from the provisions of 14 CFR 380.30 and 399.84 granted in Order 85-12-68 is amended to permit direct or indirect air carriers for scheduled and charter service, including tour operators, to state foreign departure taxes, security charges, custom fees, immigration fees, security fees, agricultural inspection fees, tourism and fuel surcharges, as well as any other surcharges (when these items are collected by offeror) that may be imposed by the U.S. Federal, State or local governments or foreign governments, separately from other charges in advertisements and promotional materials, provided that all such advertisements clearly and conspicuously state elsewhere in the advertisement the amount of such charges and the services such charges cover and indicate that such charges must be paid by the consumer in addition to the advertised price.[3]

2. This amendment becomes effective 30 days after the service date of this order.

By: MATTHEW V. SCOCOZZA
Assistant Secretary for Policy
and international Affairs

(SEAL)

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[3] This action in no way alters the exemption already granted with respect to the $3 U.S. departure tax.

[Attachment C to Exhibit A to Motion for Temporary Restraining Order]

Order 88-8-2

UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, D.C.

Issued by the Department of Transportation
on the 1st day of August, 1988

SERVED AUGUST 2, 1988

Clarification of Amendment of Exemption to allow separate listing of service fees in advertisements for air transportation. — Docket 43585 43596

ORDER CLARIFYING AMENDMENT TO EXEMPTION

The Department's policy on advertising air transportation, 14 CFR 399.84, requires that all price advertisements of flights, tours, components of tours state the entire price of advertised flights, tours, or any tour components. Similarly, our policy on public charters, 14 CFR 380.30, requires that all charter solicitation materials from direct or indirect air carriers or their agents state the entire price of their charters, tours, or any tour components. These sections reflect the Department's view of what sort of price advertising constitutes an unfair or deceptive practice within the meaning of section 411 of the Federal Aviation Act.

By Order 85-12-68 (served December 31, 1985), we granted an exemption from sections 399.84 and 380.30 to permit price advertisements that exclude the U.S. international departure tax from the total advertised price as long as they clearly state elsewhere both the amount of the tax and that all passengers must pay it in addition to the price advertised. Subsequently, by Order 88-3-25 (served march 16, 1988), we amended the exemption granted by Order 85-12-68 to allow price advertisements that list certain other taxes and government-imposed or government approved fees separately, provided that the amount of each such charge is included in the advertisement, either separately or as a total.[1] We found that in the aftermath of Order 85-12-68, the number of "other charges" had risen significantly. Most of the new charges were for services imposed or specifically approved by various U.S. government agencies–for example, custom fees, immigration fees, and security charges.

We found that these new charges made it difficult for advertisers to comply fully with sections 399.84 and 380.30. Advertisers often advertise one-way fares, stating that the advertised price is only available as part of a round-trip purchase, but not all of the new charges apply to all itineraries or even to both parts of every round-trip itinerary. For example, security charges do not apply in all international markets.

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[1] Neither Order 85-12-68 nor Order 88-3-25 superseded the requirement in the Internal Revenue Code that the eight percent federal tax on all tickets for domestic air transportation be included in the advertised price (*see* 26 U.S.C. §7275). The instant order likewise leaves this requirement unchanged: the eight percent federal tax may not be listed separately.

Immigration and customs fees apply only to flights to the United States. Fuel surcharges generally apply only to flights leaving the locale where they are imposed and not on incoming flights. With the variety of new chargers and the variation in their applicability, advertisers' confusion over how to comply with sections 399.84 and 380.30 resulted in inconsistent and confusing advertising. Consumers often found it difficult if not impossible to determine precisely what their trips would cost: some advertisements gave no indication at all of additional charges.

Balancing the industry's need to advertise innovatively and competitively against the traveling public's need for accurate price information, in Order 88-3-25 we broadened the exemption we had granted in Order 85-12-68 to permit the exclusion from the total advertised price of foreign departure taxes (if collected by the advertiser), customs fees, immigration fees, security fees, agriculture inspection fees, tourist and fuel surcharges,[2] and any other surcharges imposed by Federal, State, or local governments of the United States or by foreign governments. As in the case of the U.S. international departure tax, all price advertisements still must clearly describe the additional charges and state their

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[2] When we issued Order 88-3-25, we understood that certain governments had imposed fuel surcharges on each ticketed passenger using certain airports and that these surcharges were to be collected by the carriers. Although the U.S. government and foreign governments may impose per-passenger charges on air transportation, state and local governments are prohibited from doing so by section 1113 of the Federal Aviation Act. Section 1113 does not bar state and local government from taxing the sale of tour components other than air transportation, however, or the sale of aviation fuel.

amounts either separately or as a total, and they must state explicitly that these charges must be paid by the consumer in addition to the advertised price. Advertisers still have the option of including surcharges in the total price, in which case they need not list them separately.

Since Order 88-3-25's issuance, confusion has arisen over the meaning of the order's first Ordering Paragraph. That paragraph provides as follows:

> The exemption from the provisions of 14 CFR 380.30 and 399.84 granted in Order 85-12-68 is amended to permit direct or indirect air carriers for scheduled and charter service, including tour operators, to state foreign departure taxes, security charges, customs fees, immigration fees, security fees, agricultural inspection fees, tourism and fuel surcharges, as well as *any other surcharges (when these items are collected by offeror) that may be imposed by the U.S. Federal, State or local governments or foreign governments*, separately from other charges in advertisements and promotional materials, provided that all such advertisements clearly and conspicuously state elsewhere in the advertisement the amount of such surcharges and the services such charges cover and indicate that such charges must be paid by the consumer in addition to the advertised price [footnote omitted, emphasis added].

It has come to our attention that several carriers have interpreted this ordering paragraph overbroadly, as license to list charges separately that are neither levied directly on passengers by a governmental entity nor specifically approved by the U.S. government as separate, per-passenger charges.[3] Apparently, these carriers have reasoned that Order 88-3-25 covers all taxes, charges, fees, and surcharges that Federal, State, local, or foreign governments approve or impose, whether on individual passengers or on the carriers themselves.

This broad interpretation is incorrect and warrants clarification of Order 88-3-25. With respect to government-imposed charges, Order 88-3-25 only exempts those charges that are levied on individual passengers and that the advertisers collect and remit to the levying government. Separate listing of these charges are not deceptive, because it informs consumers of the exact amount that will be collected and passed on to the government. The carriers retains no part of these charges. Not only is separate listing of these charges not deceptive, but we believe that passengers benefit from knowing how much they are paying government entities apart from the fares they pay the carriers.

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[3] Order 88-3-25 expressly allows per-passenger security charges, which the Department has approved (Order 88-4-7), to be listed separately, but we intended to allow separate listing of any per-passenger surcharge that the U.S. government may expressly approve. Security fees have been listed separately in price advertisements since long before Order 88-3-25 explicitly sanctioned this practice, but no consumers have filed complaints, and we have no other evidence that separate listing of these fees is in any way deceptive.

Order 88-3-25 does not exempt per-passenger surcharges that carriers themselves set in response to charges which government entities levy on them without regard to individual passengers. Separate listing of these surcharges could well be deceptive. For one thing, it would give the impression, probably erroneous, that the carrier's own incremental costs were the same for every passenger in every market involved. For another, we would have no reasonable way of determining whether or to what extent any carrier's surcharge accurately reflected its per-passenger costs. Carriers are entitled to recoup their costs, of course, but surcharges set by the carriers themselves and not approved by a government entity as separate surcharges must be included in the total airfare advertised. For example, if a local government imposes a per-gallon tax on aviation fuel purchased at its airport, a carrier is free to impose a surcharge on all tickets for flights departing from that airport. Regardless of such a surcharge's genesis, however, it must be included in the total advertised airfare.

Thus, our policies require the total price advertised to include all government-imposed charges collected from the passenger that are not passed directly to a government entity. We continue to regard separate listing of these government-imposed charges as an unfair or deceptive practice within the meaning of section 411.

ACCORDINGLY:

1. We clarify Order 88-3-25 to exclude from the exemption it grants any price advertisement that lists government-imposed taxes, charges, fees, or surcharges separately when such taxes, charges, fees,

or surcharges are not levied on individual passengers by a government entity and remitted directly to the levying government, and

2. We further clarify Order 88-3-25 to include in the coverage of its exemption not only security fees but any other carrier fee or surcharge that may be approved by the U.S. government for separate imposition on individual passengers.

By: MATTHEW V. SCOCOZZA
Assistant Secretary
for Policy and International Affairs

(SEAL)

[Exhibit B to
Motion for Temporary Restraining Order]

[Title omitted in printing.]

AFFIDAVIT OF TRACY BRITTON

BEFORE ME, the undersigned authority, personally appeared Tracy Britton, who being by me duly sworn, deposes and states as follows:

1. My name is Tracy Britton. I am over the age of 21 years, have never been convicted of a crime, and have personal knowledge of all the facts and opinions contained herein.

2. I am employed by Trans World Airlines, Inc. (TWA) as Staff Vice President - Advertising and Marketing. I have held this title since December 1988. Prior to that time, I was TWA's Director of Advertising and Marketing for two years. I have been employed by TWA since October 1980 and have been involved in TWA's advertising and general retail operations since 1981. I have been individually responsible for TWA's advertising and promotional campaigns since 1986 and am personally knowledgeable regarding those efforts.

3. Besides being familiar with TWA's advertising program since 1981, I am also familiar with the regulatory framework in which major airlines determine and publish their air fares for passenger travel.

4. When establishing and advertising air fares for passengers on its commercial flights, TWA and, I believe, all other domestic American airlines look to federal law and guidelines, as articulated in the Federal Aviation Act and in the rules and

regulations issued by the United States Department of Transportation (DOT) or its predecessor agency, the Civil Aeronautics Board (CAB). Throughout the entirety of my experience in the air travel industry up through 1987, such Federal laws, rules, and regulations had been the exclusive authoritative source of law for what constituted fair, unfair or deceptive practices in the advertising and pricing of commercial air fares. I know of no other governmental body which, prior to that time, attempted to inject itself in this comprehensive air fare regulatory framework. Starting in 1987, the National Association of Attorneys General (NAAG) first exerted pressure on TWA and other airlines to make far-reaching changes in their advertising of commercial air fares.

5. In 1987 and 1988, NAAG issued and forwarded to certain representatives of the air travel industry, including TWA, a copy of a proposed set of guidelines on advertising and marketing practices for air fares ("Guidelines"). Despite the objections of TWA, its competitors in the air travel industry, and even the DOT, NAAG and/or certain of its members recently have indicated their intent to proceed with the filing of a suit or suits under various state consumer protection laws, seeking thereby to control the advertising practices of commercial airlines.

6. The foregoing threat by NAAG and/or certain of its members suggests that in the future, TWA will be compelled to formulate its advertising of air fares so as to comply not only with Federal law, but also with the law of up to 50 states and U.S. territories. If this occurs, there is a great potential for confusion for the customer and inconsistency among the regulations. TWA also faces the possibility of

suits in the courts of the several states which would seek to compel it to alter advertising which already meets the uniform federal standard.

7. Specifically, Texas Attorney General Jim Mattox, a member of NAAG, has let it be known through Stephen Gardner, his assistant attorney general, that Mr. Mattox intends to file suit against TWA, allegedly on the basis of deceptive advertisement of air fares. See the attached true copy of Stephen Gardner's letter of November 14, 1988 to Tom Ahlf, Assistant General Counsel of TWA (Exhibit 1).

8. By taking this position, attorney general Mattox specifically seeks to compel TWA and similarly situated airlines to include in their published air fares and in their advertising the $3.00 international departure fee, the $10.00 customs and immigration fee, and the $10.00 security surcharge which TWA and certain similarly situated airlines currently impose on transatlantic air travel. While the $3.00 international departure fee and the $10.00 customs and immigration fees have been mandated by federal law (since 1970 and 1986 respectively) and are collected by all airlines in the transatlantic market, the security surcharge of $10.00 is levied only by certain U.S. flag carriers. TWA has assessed such a fee since 1986 in connection with security services and other measures against the occurrence of terrorist attacks on American passengers or American property in the transatlantic air travel market.

9. TWA regularly advertises its transatlantic and other rates, routes, and services in newspapers and other publications that circulate in

Texas. All of TWA's advertisements published in the United States fully and completely disclose all three of the transatlantic surcharges in the aggregate. The aggregated charges are usually described in this manner: "$23 U.S. departure tax, security surcharges, federal inspection fees and other government taxes." A representative sample of advertisements published in the national edition of the New York Times during the last three months of 1988 is attached hereto as Exhibit 2. Advertisements in the attached Exhibit 2 are in full compliance with all applicable federal laws, rules and regulations, including DOT rules and regulations. Advertisement of the mandatory transatlantic surcharges separately from the total advertised air fare has been specifically approved by DOT Orders 85-12-68, 88-3-25 and 88-8-2.

10. If TWA is compelled to conform its advertising practices to the NAAG Guidelines with respect to the $23.00 in mandatory fees assessed transatlantic travellers, TWA'S advertising in the broadcast media will necessarily contain less information than under the federal regulatory scheme which the DOT has fostered. Only so much information can be effectively communicated in 30 or 60 second increments. It is generally impossible in 30 to 60 seconds to make all the disclosures which compliance with the NAAG Guidelines will require or make necessary. Hence, less broadcast advertising will be placed, or the advertisements will contain no air fare information at all. Furthermore, without the ability to publicize a fare reduction effectively, the incentive to cut fares will virtually disappear. With a lessening of information available to the public, the market place will not work effectively, either as a pricing mechanism or as a means of disseminating information.

11. Compliance with the NAAG Guidelines will also result in a competitive disadvantage between TWA and foreign flag carriers. TWA already makes a full disclosure in its advertisements of all fees and surcharges, including the $10.00 security surcharge, in full compliance with DOT rules and regulations. (See Exhibit 2.) If TWA is required to incorporate the $10.00 security surcharge in the stated air fare, TWA will appear to be charging a higher air transport fare than its foreign counterparts that do not assess a security surcharge. Thus, besides interfering with the exclusive jurisdiction of the DOT in air fare advertising and compelling TWA to comply with a complicated mix of conflicting rules and regulations, imposition of the NAAG Guidelines will also compel TWA and similarly situated U.S. flag carriers to consider whether their assessment of a security surcharge will place them at a competitive disadvantage with respect to foreign-flag carriers.

12. If compelled to conform its advertising policies to the NAAG Guidelines, TWA also faces the prospect of dealing with inconsistent and conflicting federal and state regulatory schemes. TWA has already been compelled to enter into an informal verbal agreement with the Attorney General of the State of New York, or face the threat of prosecution in that jurisdiction. That agreement with a NAAG member has severely affected the flow of information to the marketplace regarding TWA air fares.

13. For example, in order to comply with its oral understanding with the New York attorney general, TWA has already been compelled to cease its advertising of air fares on radio altogether, since it

was impossible in sixty seconds to disclose the nine different restrictions which NAAG would have required. Television advertising has also been complicated and adversely affected by the increased use of superimposed legends and mandatory audio disclosures. Newspaper advertisements can no longer incorporate a large number of prices for multiple destinations, because of space limitations. For example, in the past, as many as 75 cities and fares may have been listed in a single large advertisement. Now, space limitations have cut this number to 10 or fewer destinations. This latter development has also created a significant disincentive against price competition. The erosion of competition has also exacerbated the decline in the number of fare reductions. "Loss leaders," or price cuts on a limited number of air routes which can be advertised in a single uncomplicated advertisement, have replaced broad-based fare reductions as the result of NAAG's interference.

14. As a further practical matter, if a Texas Attorney General can compel TWA to modify its advertising in a state as large as Texas, it effectively compels TWA to regulate its advertising nationally in conformity to Texas expectations. However, the Attorney Generals of Utah and New Mexico have dissented from the enforcement guidelines which NAAG has announced. Hence, TWA and other similarly situated carriers may be confronted with the specter of more than 50 different state and territorial regulatory schemes, in addition to the already comprehensive federal scheme. This threat is clearly demonstrated by New York and Texas' conflicting interpretations of the NAAG Guidelines. Although TWA is in compliance with the NAAG Guidelines in New York (as modified by oral agreement with the

New York Attorney General), the Texas Attorney General is threatening to proceed with legal action against TWA, based on his apparently conflicting interpretation of the NAAG Guidelines.

15. As noted in the attached Exhibit 2, TWA's advertising on its face discloses the existence of an aggregate of $23.00 in transatlantic fees (including the $3.00 international departure tax, the $10.00 customs fee, and TWA's security surcharge of $10.00 on transatlantic flights). Thus, these advertisements contain nothing that is deceptive or misleading to the citizens of the State of Texas or that violates the State of Texas' consumer protection laws.

16. My staff and I have attempted to estimate the impact on TWA's revenues and the number of passengers who would switch from TWA to a foreign flag carrier if the NAAG Guidelines are implemented. While we are certain that there would be a decrease in revenue and a loss of customers, we have determined it is impossible to determine with precision or even to approximate the magnitude of the damage. The losses in revenue due to competitive disadvantage could vary tremendously in response to fluctuations in the dollar's exchange rate, a resurgence in terrorism directed at the air industry (such as the Pan Am Flight 103 tragedy), the weather in the United States and Europe, the health of the economy over-all, or a change in the identity, number or marketing programs of the airlines involved in the transatlantic air travel market.

[Signature and jurat omitted in printing.]

[Exhibit 1 to Exhibit B to Motion for Temporary Restraining Order]

[Letterhead of Texas Attorney General]

November 14, 1988

VIA FEDERAL EXPRESS

Tom Ahlf, Esq.
Assistant General Counsel
TWA, Inc.
605 Third Avenue, 43rd Floor
New York, New York 10158

Re: Disclosure of fare surcharges in advertisements

Dear Mr. Ahlf:

I am writing on behalf of the States of California, Massachusetts, New York, Texas, and Washington to reaffirm the position of the states regarding fare surcharges in advertisements. It is the position of the states that any fuel, tax, or other surcharge to a fare must be included in the total advertised price of the fare. Failure to do so violates our respective state consumer protection laws.

Specific surcharges which must be included in the advertised fare are

- the $3.00 international departure fee,
- the $10.00 customs fee,
- the "security" surcharge (usually $10.00), and

- any fuel surcharge.

It is no defense to claim that the surcharges are disclosed elsewhere in the advertisement. The deception, and thus the violation of our laws, occurs when the advertisement states a specific amount for a fare which is not in fact the true cost because the surcharges have been factored out. This deception cannot be cured by a footnote or other separate reference.

The states do not wish to burden airlines unduly with respect to advertising their fares. Full disclosure in this instance is actually simpler – no footnote is required and there is therefore less "clutter" in the advertisement.

More importantly, our citizens – and your customers – will not be deceived by inaccurate information.

The states are aware that the United States Department of Transportation ("DOT") has taken the position that factoring out some surcharges is proper. In Orders 8-3-25 and 88-8-2, DOT has condemned fuel surcharges but has condoned the three international fare surcharges (departure, customs, and "security").

This position taken by DOT is contrary to its own existing regulation (14 CFR §399.84) which says, in relevant part:

> "[A]ny advertising or solicitation...for passenger air transportation...that states a price...[is] an unfair or deceptive practice, unless the price stated is the entire price to be paid by the customer...for such air transportation... ."

The states believe that DOT itself violated the law when it issued these orders. Accordingly, the states signing this letter, together with 22 other states, have sued DOT for its illegal actions. That case is now pending in the United States Court of Appeals for the District of Columbia Circuit in Washington, D.C. (Docket Nos. 88-1348 and 88-1682). It is scheduled for oral argument on January 23, 1989.

The states are also aware that certain members of the industry have voiced the opinion that state enforcement of our consumer protection laws has been preempted by the DOT. The states disagree. Regardless of whether DOT is willing to allow deceptive advertising, the states are not. Our analysis of the law of preemption in this area convinces us that the states are free to protect our citizens from deception by enforcing our state consumer protection laws. We believe that this position fully comports with the Administration's own policy on preemption as expressed in Executive Order 12612, issued on October 26, 1987.

We are, however, aware that the apparent attempt by DOT to contravene the law by allowing surcharges has possibly created an atmosphere of confusion in the industry. Airlines may believe that they only need to comply with the DOT position.

This is not the case. Airlines may comply with the laws of the states without conflicting with DOT policy, and accordingly they must do so. This letter has been sent to every airline which we have identified as deceiving the public through surcharge advertising. This is the final opportunity to cure your violation of the state laws.

This letter serves as formal notice of intent to sue as required by our respective state laws. If your airline deceptively advertises fares in the future, you will be subject to being sued without further notice or opportunity to cure.

To allow time to bring your advertising into compliance, we will not take action until after November 30. Any advertisement which appears prior to December 1 will not be the subject of legal action by the states signing this letter, *unless* a deceptive advertisement appears on or after December 1.

If you have any questions regarding the position stated in this letter, we encourage you to contact us for further discussions.

It is our desire that, having made our position clear, we may expect cooperation from all airlines in preventing future deception.

Very truly yours,

/s/STEPHEN GARDNER
Assistant Attorney General

[Exhibit 2 to Exhibit B to Motion for Temporary Restraining Order]

Our new low fares will have you watching the clock.

$398
LONDON
ROUNDTRIP

Amsterdam	$428
Copenhagen	$548
Frankfurt	$479
Lisbon	$492
Madrid	$492
Milan	$492
Paris	$499
Rome	$564
Tel Aviv	$679

TWA

Exhibit 2

BEST AVAILABLE COPY

[Text of advertisement on preceding page.]

Our new low fares will have you watching the clock.

What's big?
Lives for the minute?
And goes ticktock?
Good guess. And there's no better time than now to see what's been keeping London ticking for centuries.

Because TWA's new super low fares to London are making a visit to Big Bend, "old Winston," and all of Europe more affordable than ever.

See the sights of London and we'll give you the countryside. Free.

And how's this for a timely deal? Just pay for a 3-consecutive-night stay in one of nine exclusive London Trusthouse Forte Hotels, and we'll give you the next three nights in any 200 specially selected Trusthouse Forte Hotels throughout Great Britain. Free*

Imagine yourself staying in Grosvenor House, the former mansion of the Duke of Westminster in London. Or how about a stay at The Swan, dating from the 14th century in Lavenham?

Just make your advance hotel reservation and stay between now and March 31, 1989. For more information call Trusthouse Forte Hotels directly 1-800-225-5843, and ask about TWA's "Countryside Special."

Drive an Alamo rental car for 3 days. Free.

Starting from the day you arrive in London, you'll get three days free use of an Alamo economy car with unlimited mileage. If you want to keep it longer, the rate is only $17 a day.†

All you do is reserve the car in advance, directly with Alamo, and show your TWA roundtrip ticket when you arrive. For more information, call Alamo at 1-800-732-3232 and ask about TWA's "London Special."

So what are you waiting for?

Isn't it time you set your watch by the granddaddy of them all?

TODAY'S TWA.
FIND OUT HOW GOOD WE REALLY ARE.*

$398 LONDON ROUNDTRIP
KLXNR

Amsterdam KLXNR	$428
Copenhagen KLXNR	$548
Frankfurt KLXNR	$479
Lisbon QLXAP180	$492
Madrid QLXAP180	$492
Milan KLXNR	$492
Paris KLXNR21	$499
Rome KLXNR	$564
Tel Aviv KLXNR	$679

For international fare information, call your travel agent, or TWA in New York at (212) 290-2141, Nassau at (516) 222-9212, Newark at (201) 643-3339, or elsewhere at 1 (800) 892-4141.

"The statute of Winston Churchill looks up at Big Ben in the clock lower of the Houses of Parliament, London"

Fare Conditions: Fares shown are roundtrip. May be nonrefundable, expire prior to other promotional offers shown, have differing advance-purchase and min/max stay requirements, may not be available on all flights or days of week and are subject to change and government approval. Varying effective dates, holidays blackouts, and cancellation/change-of-itinerary penalties apply. Int'l fares do not include $23 U.S. departure tax, security surcharges, federal inspection fees and other gov't taxes Fares/service vary by airport.

TWA

*Hotel Offer: Hotel rooms are subject to availability, and passengers must originate in the U.S. Offer is not combinable with any other Trusthouse Forte promotional or seasonal weekend rates.

†Car Offer: Fuel, taxes and optional items not included. Standard drive qualifications apply. Subject to availability. Offer is not valid 12/16-12/31/88. Ends 3/31/89.

[Exhibit C to
Motion for Temporary Restraining Order]

[Title omitted in printing.]

BEFORE ME, the undersigned authority, personally appeared Vivian Caudle, who being by me duly sworn, deposes and states as follows:

1. My name is Vivian Caudle. I am over the age of 21 years, have never been convicted of a crime, and have personal knowledge of all the facts and opinions contained herein.

2. I am employed by Continental Airlines, Inc. (Continental) as Director of Marketing Services. I have held this position since October 1986. Prior to that time, I was associated with Tracy Locke, an advertising and public relations firm, where I was chiefly responsible for Frontier Airlines' advertising program for one year. As Continental's Director of Marketing Services, I am personally responsible for Continental's domestic advertising and promotional campaigns and its efforts to comply with applicable Federal rules. I am also personally responsible for assuring that all Continental advertising, for both its domestic and international divisions, is reviewed by Continental's legal staff to assure full and fair disclosure of important facts to Continental's prospective customers.

3. Besides having personal knowledge of Continental's advertising program since 1986, I am also generally familiar with the regulatory framework in which Continental determines and advertises to the public its air fares for passenger travel.

4. When setting and advertising its commercial passenger air fares, Continental looks to federal law and guidelines. Specifically, Continental carries out these activities pursuant to the Federal Aviation Act and the rules and regulations issued by the United States Department of Transportation (DOT) or its predecessor agency, the Civil Aeronautics Board (CAB). Throughout my experience in the air travel industry, these Federal laws, rules, and regulations have been considered the final authority regarding allegedly unfair or deceptive practices in the advertising of commercial air fares. I am unaware of any attempts by any other government agency to interfere with or become involved in this federal regulatory framework until 1987. Beginning that year, the National Association of Attorneys General (NAAG) first exerted pressure on Continental and certain other airlines to make far reaching changes in their advertising of commercial air fares.

5. In 1987 and 1988, NAAG issued a proposed set of guidelines on advertising and marketing practices for air fares ("Guidelines"). NAAG furnished Continental with a copy of the Guidelines and requested comments. Despite objections to the Guidelines by Continental and others (including the DOT), NAAG and/or certain of its members have indicated an intent to file suit under state consumer protection laws in order to enforce the Guidelines. By this means, NAAG and/or certain of its members seek to regulate the advertising practices of Continental and other commercial airlines.

6. NAAG's actions strongly suggest that in the future, Continental may be forced to advertise its air fares in compliance not only with Federal law, but also in compliance with as many as 50 or more state and territorial regulatory regimes. There is a great potential for different and inconsistent regulatory schemes and confusion of the public. Continental also faces the possibility of suits in one or more state courts which would compel it to alter advertising which already complies with DOT's uniform standards for air fare advertisements.

7. In particular, Texas Attorney General Jim Mattox, a member of NAAG, has informed Continental through Stephen Gardner, his assistant attorney general, that legal action against Continental will be initiated unless Continental incorporates certain surcharges in its total advertised price for transatlantic air fares. See the attached true copy of Stephen Gardner's letter of November 14, 1988 to John Williams, General Counsel of Continental (Exhibit 1).

8. Attorney General Mattox specifically seeks to compel Continental to include in its published air fares and in its advertising the $3.00 international departure tax, the $10.00 immigration and customs fee, and the $10.00 security surcharge which Continental currently levies on transatlantic air travel. While the $3.00 international departure tax and the $10.00 immigration and customs fee are mandated by federal law and are assessed by all airlines in the transatlantic market, the security surcharge of $10.00 is levied only by certain U.S. flag carriers, including Continental, in connection with security services and other measures against the

possibility of terrorist attacks on American passengers and property during transatlantic flights.

9. Continental regularly advertises its rates, routes and services in newspapers that are published and circulated in Texas. Both in these advertisements and in Continental's other advertisements published in the United States, Continental has fully and completely disclosed the three transatlantic surcharges in its advertising, including the security surcharge imposed by Continental. As an example, attached hereto as Exhibit 2 is a true copy of a Continental advertisement which ran in the Houston Chronicle on January 15, 1989. The attached Exhibit 2 fully complies with all applicable federal laws, rules and regulations, including DOT rules and regulations. The advertisement of mandatory fees and surcharges separate and apart from the total advertised air fare is specifically permitted by DOT Orders 85-12-68, 88-3-25 and 88-8-2.

10. Because of the threat of litigation by NAAG and/or certain of its members, Continental has attempted to conform its advertising practices to the NAAG Guidelines, to the extent such Guidelines are not in direct conflict with DOT regulations. However, such direct conflicts clearly exist, and the need to reconcile the inconsistencies has dramatically complicated Continental's advertising program. For example, NAAG's Guidelines allow the advertisement of restricted fares on billboards with only the notation "significant restrictions apply." DOT's Federal regulations do not permit this practice, and in fact require a more detailed disclosure. NAAG's attempted promulgation of an inconsistent

Guideline has caused unnecessary difficulties with Continental's program of billboard advertising.

11. If Continental is forced to comply with the NAAG Guidelines regarding surcharges, competition in the airline industry will be impaired, rather than fostered. More specifically, Continental will face a competitive disadvantage against foreign flag carriers which do not assess a security surcharge, as Continental does. Continental already discloses in its advertising the existence of a separate $10.00 security surcharge, in full compliance with DOT Orders 85-12-68, 88-3-25 and 88-8-2. (See Exhibit 2.) Forcing Continental to go the further step of incorporating the $10.00 security surcharge in its stated air fares will make Continental appear to charge a higher air transport fare than its foreign counterparts. Thus, besides interfering with the exclusive jurisdiction of the DOT in air fare advertising and compelling Continental to comply with a complicated mix of conflicting rules and regulations, imposition of the NAAG Guidelines will also compel Continental to consider whether its assessment of a security surcharge will place it at a competitive disadvantage with respect to foreign-flag carriers.

12. If strict compliance with NAAG Guidelines is required, significantly less information will be advertised in the market place regarding Continental's system-wide rates. Already, compliance with NAAG's Guidelines has forced Continental to reduce the number of air fares quoted in its printed advertising featuring price listings for multiple destinations. Because of space restrictions and the NAAG Guidelines' type requirements, Continental's traditional 30-inch print advertisement

cannot accommodate a price listing of more than approximately 45 destinations. This represents a 25% decrease from the pre-Guideline advertisements, which listed approximately 60 destinations. As a further example of the adverse impact the NAAG Guidelines have had, Continental has been forced to cease the use of 10-second television and radio advertisements, as it is impossible to convey air fare information in that span of time with all of the NAAG required disclosures. If Continental is compelled to follow the NAAG Guidelines' requirements regarding surcharges, Continental in all probability will have to abandon the use of 30-second radio advertisements as well. Consequently, the NAAG Guidelines will significantly reduce both the amount and quality of information available in the highly competitive transatlantic airline market.

13. As noted above, Texas' Attorney General has advised Continental of his intent to compel Continental to regulate its advertising in conformity with his interpretation of the NAAG Guidelines. However, the Attorneys General of Utah and New Mexico have vigorously dissented from the enforcement guidelines which NAAG has announced. Thus, Continental and other similarly situated carriers face the possibility of having to conform to the requirements as many as 50 or more different state and territorial regulatory schemes, in addition to the already comprehensive federal scheme.

14. At all times during my employment with Continental (including before the NAAG Guidelines were announced), Continental's advertisements on their face have disclosed the fact that in addition to the air fare charged by

Continental, the consumer on a transatlantic flight would be required to pay a U.S. departure tax. Since the customs fee and the security surcharge have become effective, Continental has also plainly disclosed the existence of these charges in its advertisements containing transatlantic fare information.

15. With my staff's assistance, I have attempted to evaluate how Continental (and the public) would be impacted or injured if the NAAG Guidelines on surcharges are implemented. Continental would necessarily lose customers to foreign flag carriers and suffer a corresponding loss in revenue. Likewise, the public faces injury in the form of less information in the market upon which to base its decisions. While we are certain that there would be a decrease in revenue and a loss of customers, it is impossible to determine the extent of the injury to Continental. Revenue losses could vary tremendously in response to a terrorist incident, fluctuations in the U.S. dollar's exchange rate, commercial developments in our American and European destinations, an upturn or downturn in the economy, or a host of other variables.

[Signature and jurat omitted in printing.]

[Exhibit 1 to Exhibit C to Motion for Temporary Restraining Order]

[Letterhead of Texas Attorney General]

November 14, 1988

VIA FEDERAL EXPRESS

John Williams, Esq.
Assistant General Counsel
Continental Airlines
2929 Allen Parkway
Houston, Texas 77017

Re: Disclosure of fare surcharges in advertisements

Dear Mr. Williams:

I am writing on behalf of the States of California, Massachusetts, New York, Texas, and Washington to reaffirm the position of the states regarding fare surcharges in advertisements. It is the position of the states that any fuel, tax, or other surcharge to a fare must be included in the total advertised price of the fare. Failure to do so violates our respective state consumer protection laws.

Specific surcharges which must be included in the advertised fare are

- the $3.00 international departure fee,
- the $10.00 customs fee,
- the "security" surcharge (usually $10.00), and

- any fuel surcharge.

It is no defense to claim that the surcharges are disclosed elsewhere in the advertisement. The deception, and thus the violation of our laws, occurs when the advertisement states a specific amount for a fare which is not in fact the true cost because the surcharges have been factored out. This deception cannot be cured by a footnote or other separate reference.

The states do not wish to burden airlines unduly with respect to advertising their fares. Full disclosure in this instance is actually simpler – no footnote is required and there is therefore less "clutter" in the advertisement.

More importantly, our citizens – and your customers – will not be deceived by inaccurate information.

The states are aware that the United States Department of Transportation ("DOT") has taken the position that factoring out some surcharges is proper. In Orders 8-3-25 and 88-8-2, DOT has condemned fuel surcharges but has condoned the three international fare surcharges (departure, customs, and "security").

This position taken by DOT is contrary to its own existing regulation (14 CFR §399.84) which says, in relevant part:

> "[A]ny advertising or solicitation...for passenger air transportation...that states a price...[is] an unfair or deceptive practice, unless the price stated is the entire price to be paid by the customer...for such air transportation... ."

The states believe that DOT itself violated the law when it issued these orders. Accordingly, the states signing this letter, together with 22 other states, have sued DOT for its illegal actions. That case is now pending in the United States Court of Appeals for the District of Columbia Circuit in Washington, D.C. (Docket Nos. 88-1348 and 88-1682). It is scheduled for oral argument on January 23, 1989.

The states are also aware that certain members of the industry have voiced the opinion that state enforcement of our consumer protection laws has been preempted by the DOT. The states disagree. Regardless of whether DOT is willing to allow deceptive advertising, the states are not. Our analysis of the law of preemption in this area convinces us that the states are free to protect our citizens from deception by enforcing our state consumer protection laws. We believe that this position fully comports with the Administration's own policy on preemption as expressed in Executive Order 12612, issued on October 26, 1987.

We are, however, aware that the apparent attempt by DOT to contravene the law by allowing surcharges has possibly created an atmosphere of confusion in the industry. Airlines may believe that they only need to comply with the DOT position.

This is not the case. Airlines may comply with the laws of the states without conflicting with DOT policy, and accordingly they must do so. This letter has been sent to every airline which we have identified as deceiving the public through surcharge advertising. This is the final opportunity to cure your violation of the state laws.

This letter serves as formal notice of intent to sue as required by our respective state laws. If your airline deceptively advertises fares in the future, you will be subject to being sued without further notice or opportunity to cure.

To allow time to bring your advertising into compliance, we will not take action until after November 30. Any advertisement which appears prior to December 1 will not be the subject of legal action by the states signing this letter, *unless* a deceptive advertisement appears on or after December 1.

If you have any questions regarding the position stated in this letter, we encourage you to contact us for further discussions.

It is our desire that, having made our position clear, we may expect cooperation from all airlines in preventing future deception.

Very truly yours,

/s/STEPHEN GARDNER
Assistant Attorney General

[Exhibit 2 to Exhibit C to Motion for Temporary Restraining Order]

LONDON WEEKENDER PACKAGE
Air inclusive

$449

- Round trip airfare from Houston
- 3 nights hotel
- Continental breakfast daily
- Hotel service-charge and taxes

London Weekender package rates are per person/double occupancy and are valid through March 9, 1989. Rates do not include $3.00 U.S. departure tax, $10.00 security fee or $10.00 federal inspection fee. Space is limited and you must travel to London on Thursday or Friday, returning on Monday or Tuesday.

CONTINENTAL
Working to be your choice to the world.

For more information, call one of the fine agencies listed.

Klein Travel
Stuebner @ Louetta
376-5500

Ashford Memorial Travel
1035 Dairy Ashford
558-5777

Journey's Unlimited
4528 Beechnut
666-6934

Viking Travel
11 Greenway Plaza #606
621-9400

Woodforest Travel
455-8870

RiverR Travel
8705 S. Manon
392-0170

Utopia Travel
5444 Westheimer
621-1000

Travel Etc
5401 Bellaire
666-6100

Westchase Travel
12280 Westheimer #300
556-9017

Astrodome Travel
661-1933

All Seasons Travel
Galleria 622-8700
Northwest 880-0050

Sharpstown Travel
Open Sat. 10-5
995-1950

Exhibit 2

BEST AVAILABLE COPY

[Text of advertisement on preceding page.]

LONDON

LONDON WEEKENDER PACKAGE

Air inclusive

$449

- Round trip airfare from Houston
- 3 nights hotel
- Continental breakfast daily
- Hotel service-charge and taxes

London Weekender package rates are per person/double occupancy and are valid through March 9, 1989. Rates do not include $3.00 U.S. departure tax, $10.00 security fee or $10.00 federal inspection fee. Space is limited and you must travel to London on Thursday or Friday, returning on Monday or Tuesday.

CONTINENTAL

Working to be your choice to the world.

For more information, call one of the fine agencies listed:

Klein Travel
Stuebner @ Louetta
376-550

Woodforest Travel
455-8870

Westchase Travel
12280 Westheimer #300
556-9017

Ashford Memorial Travel
1035 Dairy Ashford
558-5777

RMR Travel
8705 S. Mason
392-0170

Journey's Unlimited
4528 Beechnut
666-6934

All Seasons Travel
Gallena 622-8700
Northwest 880-0050

Travel Etc.
5401 Bellaire
664-6100

Astrodome Travel
661-1933

Utopia Travel
5444 Westheimer
621-1000

Viking Travel
11 Greenway Plaza #606
621-9400

Sharpstown Travel
Open Sat. 10-6
995-1950

©1989 Continental Airlines, Inc.

[Exhibit D to
Motion for Temporary Restraining Order]

[Title omitted in printing.]

AFFIDAVIT OF BRUCE O'BRIEN

BEFORE ME, the undersigned authority, personally appeared Bruce O'Brien, who being by me duly sworn, deposes and states as follows:

1. My name is Bruce O'Brien. I am over the age of 21 years, have never been convicted of a crime, and have personal knowledge of all the facts and opinions contained herein.

2. I am employed by Trans World Airlines, Inc. ("TWA") as Staff Vice President - International Pricing. I have held this post since October 1986. Prior to that time, I was TWA's Director-International Pricing for approximately seven years. My responsibilities as Staff Vice Presiden-International Pricing include the preparation and dissemination of all TWA tariffs, as well as the filing of these tariffs with the U.S. government and with foreign governments.

3. Under applicable federal laws, TWA files tariffs with the U.S. Department of Transportation ("DOT") that describe its rates, fares, and services. DOT reviews these proposed tariffs and approves or disapproves them in a manner consistent with federal law.

4. TWA's tariffs set forth the rights and duties of both the airline and its passengers. Consistent with the requirements of the Code of Federal Regulations, these tariffs are available to the public for inspection. TWA's tariffs, or a detailed

summary of their contents, are also accessible to travel agents and the public through major U.S. computer reservation networks, including PARS (Passenger Advance Reservation System), Sabre, Apollo, and similar systems.

5. In conformity with federal regulations, the tariffs which TWA files and which are approved by DOT list separately the charges for air fare and any surcharges which may be applicable, such as the $10.00 security surcharge which TWA levies on transatlantic air travel.

[Signature and jurat omitted in printing.]

[Exhibit E to
Motion for Temporary Restraining Order]

[Title omitted in printing.]

AFFIDAVIT OF JOHN POWER

BEFORE ME, the undersigned authority, personally appeared John Power, who being by me duly sworn, deposes and states as follows:

1. My name is John Power. I am over the age of 21 years, have never been convicted of a crime, and, except as indicated, have personal knowledge of all the facts and opinions contained herein.

2. I have been employed by British Airways Plc as Senior Vice President - Marketing, North America, since September 1, 1986. In that capacity, I am the British Airways manager ultimately responsible for all sales and marketing operations in North America, including the setting of British Airways' fares, the development of promotions and advertising, and the determination of all marketing, planning and policies. I have been employed by British Airways in various locations and in various marketing and other capacities since 1965.

3. As Senior Vice President of British Airways, I have personal knowledge of British Airways' marketing activities and am generally familiar with other aspects of British Airways' operations in North America, including the regulatory framework in which British Airways operates in the United States.

4. British Airways is a company organized under the laws of the United Kingdom. It has its

principal place of business at Heathrow Airport in Hounslow, England, outside of London. British Airways is licensed by the Civil Aviation Authority ("CAA") in the United Kingdom to provide domestic and international air transportation in the United Kingdom.

5. British Airways is not permitted under U.S. law to provide any domestic U.S. air transportation. British Airways is defined under U.S. aviation laws as a "foreign air carrier" and is authorized to provide international air transportation to and from the United States only through the sponsorship of the U.K. government and only pursuant to an agreement between the governments of the United States and the United Kingdom generally known as "Bermuda 2."

6. Each British Airways flight between the U.S. and the U.K. is subject to regulation by both governments. As a British carrier, British Airways is extensively regulated by the CAA, without whose license we could not operate. To the extent British Airways provides international air transportation to and from other countries, including the United States, we must also comply with their aviation regulations. Because regulatory philosophies can differ and regulations can conflict, Bermuda 2 specifies the way in which each government will regulate carriers certified by the two countries to provide international air transportation between them.

7. Bermuda 2 contains detailed provisions specifying what services we can provide, what routes we can serve, what capacity we can provide, what fares we can charge and, in general, the manner in

which we can operate. Of special interest in light of the issue before the Court, Bermuda 2 contains detailed provisions on how tariffs are to be established and approved by the two governments and how conflicts between the governments on tariff issues are to be resolved.

8. In accordance with Bermuda 2, both the CAA and the U.S. Department of Transportation ("DOT") require that all carriers providing air transportation between the U.S. and the U.K. file tariffs specifying their fares and charges. All carriers are required, moreover, to make these tariffs available for public inspection and to charge passengers no more than the amounts specified in the tariffs. In accordance with these requirements, British Airways files tariffs with both the CAA and the DOT that specify the fares British Airways charges for international air transportation. The charges that we collect for the benefit of the governments (and I would emphasize that these charges are not collected for the benefit of British Airways), including the taxes and fees at issue in this proceeding, are either specified separately, in the case of the U.S. DOT, or not included in our tariff, in the case of the CAA. British Airways' U.S. tariff is explicit on this point:

"Any tax or other charge imposed by government authority and collectible from a passenger will be in addition to the published fares and charges. EXCEPTION: transit taxes at connecting points will be borne by carrier in case of scheduled overnight or other stops or through services."

A true and correct copy of the excerpt from the British Airways tariff filed with the DOT containing this rule is attached hereto as Exhibit 1.

9. The British Airways tariffs have been approved by both the U.K. and U.S. aviation authorities in accordance with the procedures set out in Bermuda 2. In accordance with government regulations, British Airways' tariffs are available for public inspection at each airport or other ticket office of British Airways, including those in Texas. In addition, British Airways publicizes its fares and charges through advertisements, including advertisements in local newspapers in Texas and other states. Until December 1988, British Airways publicized its fares in such advertisements in the same manner it did in its tariff, i.e., British Airways listed separately the fare it charged for air transportation and the taxes it collected for the benefit of the U.S. government. A true and correct copy of an example of such advertisements published last September and October in newspapers around the country, including the Dallas Morning News, Dallas Times-Herald, Fort Worth Star-Telegram, Houston Chronicle and Houston Post, is attached hereto as Exhibit 2. This advertisement shows separately the air fare British Airways charges pursuant to its filed tariff and the departure tax and customs fee British Airways collects for the U.S. government. This manner of showing fares and charges was expressly authorized by the DOT. Orders 85-12-68 (December 24, 1985) and 88-3-25 (March 10, 1988).

10. By letter dated November 14, 1988, British Airways was advised by Stephen Gardner, Assistant Attorney General of Texas, that the States of Texas, California, Massachusetts, New York and Washington would sue British Airways for violating state consumer protection laws if British Airways

continued to advertise fares and taxes separately in the manner specified in British Airways' tariff and approved by the CAA and DOT. A true and correct copy of Mr. Gardner's letter is attached hereto as Exhibit 3. By enforcing the guidelines promulgated by the National Association of Attorneys General, Texas and other states are attempting to require British Airways to publicize its fares and charges in a way directly contrary to the way in which U.K. and federal U.S. law permits, and indeed requires, British Airways to publish its fares, i.e, in the manner specified in its tariff.

11. Since early December 1988, British Airways has complied with the demands of Mr. Gardner either by refraining from price advertising or by including the government taxes in the figure listed for British Airways' fare. Although British Airways attracts customers through the quality of its overall service, either action may place British Airways at a significant competitive disadvantage in market segments that are price sensitive. If we refrain from price advertising, we will be unable to stimulate the increased traffic that would come from price-sensitive travelers who would be prompted to travel or to choose the U.K. as a destination by price advertising. If, on the other hand, British Airways does advertise prices but complies with the demands of Mr. Gardner, we will be at a competitive disadvantage for price sensitive travelers vis-a-vis other air carriers who exercise their rights to abide by the federal regulations and refuse to comply with the rules the states are attempting to enforce. Because our fare would appear to be higher than such airlines, when in fact it is the same or lower, we would lose many of those price-sensitive travelers we hope to reach with price advertising. We could not quantify

the revenues we would lose from such a competitive disadvantage, nor would there be any remedy available to us if we could quantify our losses.

12. In the long run, it is my opinion that the inhibitions placed on price advertising by the states could actually inhibit the availability of innovative or discount fares designed to attract the most price-sensitive travelers. Because not all airlines collect the same amounts in surcharges, those (which do not include British Airways) that collect more surcharges than others are likely to be reluctant to introduce new discount fares if they do not appear to be lower than their competition.

[Signature and jurat omitted in printing.]

[Exhibit 1 to Exhibit E to Motion for Temporary Restraining Order]

C.T.C.(A) NO. 306 ¶C.A.B. NO. 505

Airline Tariff Publishing Company
Agent International Passenger Rules
and Fares Tariff No. BA-1 Original Page BA-61

Rule SECTION I - GENERAL RULES

40 TAXES

Any tax or other charge imposed by government authority and collectible from a passenger will be in addition to the published fares and charges.
EXCEPTION: Transit taxes at connecting points will be borne by carrier in case of scheduled overnight or other stops on through services.

45 ADMINISTRATIVE FORMALITIES, PASSPORTS, VISAS AND TOURIST CARDS

(A) COMPLIANCE WITH REGULATIONS

The passenger shall comply with all laws regulations, orders, demands or travel requirements of countries to be flown from, into or over, and with all rules, regulations and instructions of BA. BA shall not be liable for any aid or information given by any agent or employee of BA to any passenger in connection with obtaining necessary documents or complying with such

laws, regulations, orders, demands, requirements or instructions, whether given orally or in writing; or for the consequences to any passenger resulting from his failure to obtain such documents or to comply with such laws, regulations, orders, demands, requirements and instructions.

(B) PASSPORTS AND VISAS

(1) The passenger must present all exit, entry and other documents required by laws, regulations, orders, demands, or requirements of the countries concerned. BA will refuse carriage to any passenger who has not complied with applicable laws, regulations, orders, demands, or requirements, or whose documents are not complete. BA is not liable to the passenger for loss or expense due to the passenger's failure to comply with this provision.

(2) Subject to applicable laws and regulations, the passenger agrees to pay the applicable fare whenever BA on government order is required to return the passenger to his point of origin or elsewhere due to the passenger's inadmissibility into a country, whether of transit or of destination. BA will apply to the

payment of such fares any funds paid by the passenger to BA for unused carriage or any funds of the passenger in the possession of BA. The fare collected for carriage to the point of refusal or deportation will not be refunded by BA.

(C) CUSTOMS INSPECTION

If required, the passenger must attend inspection of his baggage, checked or unchecked by customs or other government officials. BA accepts no responsibility toward the passenger if the latter fails to observe this condition. If damage is caused to BA because of the passenger's failure to observe this condition, the passenger shall indemnify BA therefor.

(D) GOVERNMENT REGULATION

No liability shall attach to BA if BA in good faith determines that what it understands to be applicable law, government regulation, demand, or other requirement requires that it refuse and it does refuse to carry a passenger.

For the explanation of abbreviations, reference marks and symbols used but unexplained hereon, see Pages BA-21 through BA-30

Issued: May 29, 1987; Effective: June 1, 1987; Printed in the USA

[Exhibit 2 to Exhibit E to Motion for Temporary Restraining Order]

[INSERT BRITISH AIRWAYS AD]

Exhibit 2

BEST AVAILABLE COPY

[Text of advertisement on preceding page.]

Superb
British fare,
now available
in Dallas/
Ft. Worth.
$438 Round-trip

Beginning October 1, you can travel non-stop to London on British Airways for just $438 round-trip. Which means you can enjoy the best of British hospitality, gracious service and classic cuisine at an unprecedented low price.

Superb British fare. Now available at a fairly unbelievable price.

For reservations call your travel agent or 1-800-AIRWAYS.

BRITISH AIRWAYS

The world's favourite airline.•

TERMS & CONDITIONS: Fare Code:QLANS. This fare available from Dallas/Ft. Worth to London on direct British Airways flights only. Travel is permitted: Eastbound Sun.-Wed., Westbound Mon.-Thurs. only. Minimum stay: 7 days. Maximum stay: 21 days. All travel must commence during the period Oct. 1, 1988 through Dec. 7, 1988 and be completed by Dec. 15. 1988. Reservations, payment and ticketing must be completed not later than 45 days prior to date of departure and within 48 hours of reservation, and are non-refundable. For tickets purchased on or before Sept. 20, 1988, advance purchase will be waived. Fares and schedules subject to change without notice. $13.00 U.S. departure tax and customs

fee not included. Changes not permitted. Limited availability. Offer not valid with children's, infant's, trade or industry discounts, or in combination with any other promotion or special offer. Subject to gov't approval.

British Airways
Job No.: BAW-BAC-88-3046DF
Title: 5 col. x 14"B/W
Publications: Various Texas Newspapers
Issue: 9/16/88
This Advertisement Prepared By
Becker Spielvogel Bates Inc.

[Exhibit 3 to Exhibit E to Motion for Temporary Restraining Order]

[Letterhead of Texas Attorney General]

November 14, 1988

VIA FEDERAL EXPRESS

Karen Crider, Esq.
General Counsel
British Airways
75-20 Astoria Boulevard
Jackson Heights, NY 11370

Re: Disclosure of fare surcharges in advertisements

Dear Ms. Crider:

I am writing on behalf of the States of California, Massachusetts, New York, Texas, and Washington to reaffirm the position of the states regarding fare surcharges in advertisements. It is the position of the states that any fuel, tax, or other surcharge to a fare must be included in the total advertised price of the fare. Failure to do so violates our respective state consumer protection laws.

Specific surcharges which must be included in the advertised fare are

- the $3.00 international departure fee,
- the $10.00 customs fee,
- the "security" surcharge (usually $10.00), and

- any fuel surcharge.

It is no defense to claim that the surcharges are disclosed elsewhere in the advertisement. The deception, and thus the violation of our laws, occurs when the advertisement states a specific amount for a fare which is not in fact the true cost because the surcharges have been factored out. This deception cannot be cured by a footnote or other separate reference.

The states do not wish to burden airlines unduly with respect to advertising their fares. Full disclosure in this instance is actually simpler – no footnote is required and there is therefore less "clutter" in the advertisement.

More importantly, our citizens – and your customers – will not be deceived by inaccurate information.

The states are aware that the United States Department of Transportation ("DOT") has taken the position that factoring out some surcharges is proper. In Orders 8-3-25 and 88-8-2, DOT has condemned fuel surcharges but has condoned the three international fare surcharges (departure, customs, and "security").

This position taken by DOT is contrary to its own existing regulation (14 CFR §399.84) which says, in relevant part:

> "[A]ny advertising or solicitation...for passenger air transportation...that states a price...[is] an unfair or deceptive practice, unless the price stated is the entire price to be paid by the customer...for such air transportation... ."

The states believe that DOT itself violated the law when it issued these orders. Accordingly, the states signing this letter, together with 22 other states, have sued DOT for its illegal actions. That case is now pending in the United States Court of Appeals for the District of Columbia Circuit in Washington, D.C. (Docket Nos. 88-1348 and 88-1682). It is scheduled for oral argument on January 23, 1989.

The states are also aware that certain members of the industry have voiced the opinion that state enforcement of our consumer protection laws has been preempted by the DOT. The states disagree. Regardless of whether DOT is willing to allow deceptive advertising, the states are not. Our analysis of the law of preemption in this area convinces us that the states are free to protect our citizens from deception by enforcing our state consumer protection laws. We believe that this position fully comports with the Administration's own policy on preemption as expressed in Executive Order 12612, issued on October 26, 1987.

We are, however, aware that the apparent attempt by DOT to contravene the law by allowing surcharges has possibly created an atmosphere of confusion in the industry. Airlines may believe that they only need to comply with the DOT position.

This is not the case. Airlines may comply with the laws of the states without conflicting with DOT policy, and accordingly they must do so. This letter has been sent to every airline which we have identified as deceiving the public through surcharge

advertising. This is the final opportunity to cure your violation of the state laws.

This letter serves as formal notice of intent to sue as required by our respective state laws. If your airline deceptively advertises fares in the future, you will be subject to being sued without further notice or opportunity to cure.

To allow time to bring your advertising into compliance, we will not take action until after November 30. Any advertisement which appears prior to December 1 will not be the subject of legal action by the states signing this letter, *unless* a deceptive advertisement appears on or after December 1.

If you have any questions regarding the position stated in this letter, we encourage you to contact us for further discussions.

It is our desire that, having made our position clear, we may expect cooperation from all airlines in preventing future deception.

Very truly yours,

/s/STEPHEN GARDNER
Assistant Attorney General

[Exhibit F to
Motion for Temporary Restraining Order]

[Title omitted in printing.]

AFFIDAVIT OF JEAN ZELKOVICH

BEFORE ME, the undersigned authority, personally appeared Jean Zelkovich, who being by me duly sworn, deposes and states as follows:

1. My name is Jean Zelkovich. I am over the age of 21 years, have never been convicted of a crime, and have personal knowledge of all the facts and opinions contained herein.

2. I am employed by Continental Airlines, Inc. ("Continental") as Director-International Pricing. I have held this position since April 1987. Prior to that time, I was Manager-International Pricing for Continental from July 1985 to April 1987. My duties as Director-International Pricing include responsibility for application, filing, and maintenance of international tariffs, both with the U.S. Government and with foreign governments.

3. Under applicable federal laws, Continental is required to file tariffs with the U.S. Department of Transportation ("DOT") that describe its rates, fares, and services for all transportation that it provides. DOT reviews these proposed tariffs and approves or disapproves them in a manner consistent with federal law.

4. The tariffs which Continental file with DOT set forth the rights and duties of both the carrier and the passengers. As required by the Code of Federal Regulations, these tariffs are available to the public for inspection.

5. In conformity with federal regulations, the tariffs which Continental files and which are approved by DOT list separately the charges for air fare and any surcharges which may be applicable, such as the $10.00 security surcharge which Continental levies on transatlantic air travel.

6. The General Rules section of Continental's tariffs includes the following language in Rule 40: "Any tax or other charge imposed by government authority and collectable from a passenger will be in addition to the published fares and charges . . .." A true copy of Rule 40 is attached as Exhibit 1 to this Affidavit. Pursuant to this rule, the U.S. departure tax and immigration and customs fees which are imposed by U.S. law and collected by Continental from its transatlantic passengers are not included in the published fares and charges in Continental's tariffs.

[Signature and jurat omitted in printing.]

[Exhibit 1 to Exhibit F to Motion for Temporary Restraining Order]

C.T.C.(A) NO. 210 ¶C.A.B. NO. 376

Airline Tariff Publishing
Company, Agent International
Passenger
Rules and Fares — 14th Revised Page 50-A
Tariff No. IPR-2 — Cancels 15th Revised Page 50-A

Rule SECTION I - GENERAL RULES

40 TAXES

Any tax or other charge imposed by government authority and collectible from a passenger will be in addition to the published fares and charges, except that transit taxes at connecting points may be absorbed under the conditions indicated in Rule 35, paragraph (A)(2)(a) and (b), provided also that such transit tax is not applicable to such through service.

45 ADMINISTRATIVE FORMALITIES, PASSPORTS, VISAS AND TOURIST CARDS

(A) COMPLIANCE WITH REGULATIONS

The passenger shall comply with all laws regulations, orders, demands or travel requirements of countries to be flown from, into or over, and with all rules, regulations and instructions of carrier. Carrier shall not be liable for any aid or information given or complying with such laws, or otherwise, or for the

consequences to any passenger resulting from his failure to obtain such documents or to comply with such laws, regulations, orders, demands, requirements, or instructions.

(B) PASSPORTS AND VISAS

(1) Each passenger desiring transportation across any international boundary will be responsible for obtaining all necessary travel documents and for complying with all government travel requirements. The passenger must present all exit, entry and other documents required by the laws, and, unless applicable laws provide otherwise, shall indemnify the carrier for any loss, damage, or expense suffered or incurred by such carrier by reason of such passenger's failure to do so. Carrier is not liable to the passenger for loss or expense due to the passenger's failure to comply with this provision. Carrier reserves the right to refuse carriage to any passenger who has not complied with applicable laws, regulations, orders, demands, or requirements or whose documents are not complete. No carrier shall be liable for any aid or information given by any agent or employee of

such carrier to any passenger in connection with obtaining such documents or complying with such laws, whether given orally or in writing or otherwise.

(2) Subject to applicable laws and regulations, the passenger agrees to pay the applicable fare whenever carrier, on government order, is required to return a passenger to his point of origin or elsewhere due to the passenger's inadmissibility into or deportation from a country, whether of transit or of destination. The fare applicable will be the fare that would have been applicable had the original ticket designated the revised destination on the new ticket. Any difference between the fare so applicable and the fare paid by the passenger will be collected from or refunded to the passenger as the case may be. Carrier may apply to the payment of such fares any funds paid by the passenger to carrier for unused carriage, or any funds of the passenger in the possession of carrier. The fare collected for carriage to the point of refusal or deportation will not be refunded by the carrier, unless the law of such country requires that such fare be refunded.

(3) PASSENGER TRANSITING WITHOUT VISA (TRWOV) - SERVICE CHARGE (Applicable to AC only)

(a) A passenger transiting, without a visa, a point(s) within a country requiring a visa for lawful entry, will be assessed, by AC, a Service Charge of U.S. Dollars $25.00 (Canadian Dollars $30.00) when AC is the carrier providing such passenger with transportation to such point(s).

NOTE: This Service Charge will be assessed either when AC issues/reissues the passenger's ticket or when passenger check-ins for flight.

†(C)(b) (Applicable to PA only A citizen/national/passport holder of the following countries; Dominican Republic, Haiti, the Caribbean Area excluding Bermuda - (applicable to travel commencing on/after February 15, 1988), transiting, without a visa, a point(s) within a country requiring a visa for lawful

entry, will be assessed, by PA, a service charge of USD 25.00 when PA is the carrier providing such passenger with transportation to such point(s).

NOTE: This service charge will be assessed either when PA issues/reissues the passenger's ticket or when passenger checks-in for flight.

(C) CUSTOMS INSPECTION

If required, the passenger must attend inspection of his baggage, checked or unchecked, by customs or other government officials. Carrier accepts no responsibility toward the passenger if the latter fails to observe this condition. If damage or caused to carrier because of the passenger's failure to observe this condition, the passenger shall indemnify carrier therefor.

(D) GOVERNMENT REGULATION

No liability shall attach to carrier if carrier in good faith determines that what it understands to be applicable law, government regulation, demand, order or requirement, requires that it refuse and it does refuse to carry a passenger.

For unexplained abbreviations, reference marks and symbols, see Pages 16-26.

ISSUED: February 5, 1988 EFFECTIVE: April 5, 1988

(Except as Noted)

(Printed in the U.S.A.)

+-Effective February 6, 1988 (except 2/from Canada) and issued on one (1) day(s) notice under D.O.T. Special Tariff Permission No. 53320.

Correction No. 80529

[Exhibit G to
Motion for Temporary Restraining Order]

[Title omitted in printing.]

AFFIDAVIT OF JOHN WILLIAMS

BEFORE ME, the undersigned authority, personally appeared John Williams, who being by me duly sworn, deposes and states as follows:

1. My name is John Williams. I am over the age of 21 years, have never been convicted of a crime, and have personal knowledge of all the facts and opinions contained herein.

2. I am the General Counsel for Continental Airlines, Inc. ("Continental"). I have held this position since October, 1981. Prior to that time I was General Counsel of Texas International Airlines. I am generally familiar with the federal regulatory framework in which major airlines determine and publish their air fares for passenger travel.

3. In 1987 and 1988, the National Association of Attorneys General ("NAAG") issued a set of guidelines which purported to represent its members' interpretations of their various state consumer protection laws, insofar as they pertained to the advertisement of commercial passenger air fares ("Guidelines"). NAAG provided Continental with a copy of these Guidelines. Continental duly noted its objections to the Guidelines, and in particular objected that the Guidelines represented an attempt to regulate an area that was already preempted by a comprehensive federal regulatory scheme.

4. On or about November 14, 1988, I received a telephone call from Stephen Gardner, the Assistant Attorney General of the State of Texas. Mr. Gardner informed me in that telephone conversation that in spite of Continental's objections, his office would initiate legal proceedings against Continental if it did not immediately comply with the Guidelines. Specifically, Mr. Gardner alleged that Continental was violating that portion of the NAAG Guidelines which purported to require the inclusion of certain surcharges in Continental's total advertised air fare for transatlantic flights (e.g., the $3.00 departure tax, the $10.00 customs and immigration fee, and the $10.00 security surcharge assessed by Continental). Continental has consistently advertised its transatlantic air fares by disclosing these additional fees and surcharges separately from the cost of the air fare itself, in a manner which has been expressly approved by the U.S. Department of Transportation (DOT) and its predecessor agency, the Civil Aeronautics Board (CAB). Despite the apparent inconsistencies and conflicts between the NAAG Guidelines (as interpreted by the Attorney General of Texas) and DOT/CAB's comprehensive federal regulatory scheme, Mr. Gardner insisted that his office would initiate legal proceedings against Continental if it continued to advertise its transatlantic air fares in this manner after December 1, 1988.

5. My office subsequently received a letter from Mr. Gardner, dated November 14, 1988. A true copy of the letter is attached as Exhibit 1 to this Affidavit. Mr. Gardner repeated his threats of litigation against Continental in this correspondence.

6. On at least three occasions since the receipt of Exhibit 1, I have had telephone discussions with Mr. Gardner in which he has emphasized further the Attorney General's intent to institute legal proceedings against Continental, allegedly because of its continued violations of the NAAG Guidelines.

[Signature and jurat omitted in printing.]

[Exhibit 1 to Exhibit G to Motion for Temporary Restraining Order]

[Letterhead of Texas Attorney General]

November 14, 1988

VIA FEDERAL EXPRESS

John Williams, Esq.
Assistant General Counsel
Continental Airlines
2929 Allen Parkway
Houston, Texas 77017

Re: Disclosure of fare surcharges in advertisements

Dear Mr. Williams:

I am writing on behalf of the States of California, Massachusetts, New York, Texas, and Washington to reaffirm the position of the states regarding fare surcharges in advertisements. It is the position of the states that any fuel, tax, or other surcharge to a fare must be included in the total advertised price of the fare. Failure to do so violates our respective state consumer protection laws.

Specific surcharges which must be included in the advertised fare are

- the $3.00 international departure fee,
- the $10.00 customs fee,
- the "security" surcharge (usually $10.00), and

- any fuel surcharge.

It is no defense to claim that the surcharges are disclosed elsewhere in the advertisement. The deception, and thus the violation of our laws, occurs when the advertisement states a specific amount for a fare which is not in fact the true cost because the surcharges have been factored out. This deception cannot be cured by a footnote or other separate reference.

The states do not wish to burden airlines unduly with respect to advertising their fares. Full disclosure in this instance is actually simpler – no footnote is required and there is therefore less "clutter" in the advertisement.

More importantly, our citizens – and your customers – will not be deceived by inaccurate information.

The states are aware that the United States Department of Transportation ("DOT") has taken the position that factoring out some surcharges is proper. In Orders 8-3-25 and 88-8-2, DOT has condemned fuel surcharges but has condoned the three international fare surcharges (departure, customs, and "security").

This position taken by DOT is contrary to its own existing regulation (14 CFR §399.84) which says, in relevant part:

> "[A]ny advertising or solicitation...for passenger air transportation...that states a price...[is] an unfair or deceptive practice, unless the price stated is the entire price to be paid by

the customer...for such air transportation... ."

The states believe that DOT itself violated the law when it issued these orders. Accordingly, the states signing this letter, together with 22 other states, have sued DOT for its illegal actions. That case is now pending in the United States Court of Appeals for the District of Columbia Circuit in Washington, D.C. (Docket Nos. 88-1348 and 88-1682). It is scheduled for oral argument on January 23, 1989.

The states are also aware that certain members of the industry have voiced the opinion that state enforcement of our consumer protection laws has been preempted by the DOT. The states disagree. Regardless of whether DOT is willing to allow deceptive advertising, the states are not. Our analysis of the law of preemption in this area convinces us that the states are free to protect our citizens from deception by enforcing our state consumer protection laws. We believe that this position fully comports with the Administration's own policy on preemption as expressed in Executive Order 12612, issued on October 26, 1987.

We are, however, aware that the apparent attempt by DOT to contravene the law by allowing surcharges has possibly created an atmosphere of confusion in the industry. Airlines may believe that they only need to comply with the DOT position.

This is not the case. Airlines may comply with the laws of the states without conflicting with DOT policy, and accordingly they must do so. This letter has been sent to every airline which we have identified as deceiving the public through surcharge

advertising. This is the final opportunity to cure your violation of the state laws.

This letter serves as formal notice of intent to sue as required by our respective state laws. If your airline deceptively advertises fares in the future, you will be subject to being sued without further notice or opportunity to cure.

To allow time to bring your advertising into compliance, we will not take action until after November 30. Any advertisement which appears prior to December 1 will not be the subject of legal action by the states signing this letter, *unless* a deceptive advertisement appears on or after December 1.

If you have any questions regarding the position stated in this letter, we encourage you to contact us for further discussions.

It is our desire that, having made our position clear, we may expect cooperation from all airlines in preventing future deception.

Very truly yours,

/s/STEPHEN GARDNER
Assistant Attorney General

[Exhibit H to Motion for Temporary Restraining Order]

IN THE UNITED STATES COURT OF APPEALS
FOR THE
DISTRICT OF COLUMBIA CIRCUIT

THE STATES OF ALASKA, ET AL.,

PETITIONERS,

AGAINST NUMBER 88-1348

UNITED STATES DEPARTMENT OF TRANSPORTATION and JIM BURNLEY, Secretary of Transportation,

RESPONDENTS.

AFFIDAVIT OF JIM MATTOX
ATTORNEY GENERAL OF TEXAS

STATE OF TEXAS
COUNTY OF TRAVIS

Before me the undersigned notary public on this day personally appeared Jim Mattox, known to me, who, being first duly sworn according to oath, stated as follows:

1. My name is Jim Mattox. I am fully competent in all respects to make this affidavit. I have personal knowledge of the facts stated in this affidavit, and they are true and correct. I have been the Attorney General for the State of Texas since 1983. Before that, I served as a member of the United States Congress from 1976 to 1982.

2. As Attorney General, I am a member of the National Association of Attorneys General

("NAAG"), which is an association of all state and territorial attorneys general. NAAG was founded in 1907 to provide a forum for the exchange of information and experience among the chief legal officers of the states and territories, to foster interstate cooperation on legal and law enforcement issues, and to conduct policy research and analysis of issues pertaining to the states and territories.

3. In June, 1987, as the result of a resolution which I sponsored (together with the three other attorneys general), NAAG directed the appointment of a Task Force of states to study the advertising and marketing practices of airline industry in the United States. In addition to the required study, the Task Force was directed to determine the nature and extent of existing unfair and deceptive airlines practices and to report a recommended course of action to NAAG at its meeting in December 1987.

4. The Task Force study was prompted by a dramatic increase of consumer complaints, received by my office and offices of other attorneys general, involving unfair and deceptive advertising and marketing practices by major airlines.

5. In August 1987, the Task Force held extensive meeting with representatives from the major airlines. The participants from these airlines included high-level executives, general counsel, managers of advertising and marketing departments, and managers of customer service and relations departments. During these meetings, exhaustive discussions were had regarding each airline's current advertising practices. Although there were numerous differences among the general operations

of each airline, many common responses emerged in response to the Task Force's examination. Many airlines stated candidly that their advertising and marketing practices were dictated by the practices of their competition. Moreover, they indicated a willingness to modify their practices as long as each airline did the same, in order to avoid any competitive disadvantages.

6. In December 1987, the Task Force presented its report and recommendations to NAAG at its winter meeting. On December 12, 1988, the members of NAAG voted overwhelmingly to adopt Guidelines proposed by the Task Force. The Guidelines were not an attempt at rulemaking, but rather, were intended to be a restatement of what is currently illegal under the laws of the various states, specifically applied to the practices of the airline industry.

7. The Guideline relevant to the subject of this case is Guideline 2.5 – "Surcharges." That Guideline says:

> Any fuel tax, or other surcharge to a fare must be included in the total advertised price of the fare.

It was, and remains, my opinion as chief legal officer of the State of Texas that this Guideline correctly summarizes the law of the State of Texas, as reflected in the Texas Deceptive Trade Practices Act, TEX. BUS. & COM. CODE §17.46 *et seq.*

8. The Guidelines took effect on January 15, 1988. On the whole, the nation's airlines complied with the principles set forth in the Guidelines. However, it soon became apparent that several airlines were not following Guideline 2.5, and were

failing to include in international fares a $23 surcharge, composed the three parts: $10 security surcharge, $3 international departure tax, and $10 custom fee. The latter two charges were forms of tax assessed by the United States government. The "security charge" is, as far as we can determine, not based on any governmental tax, but rather created out of whole cloth and adopted as an industry standard of deception.

9. Because of these airlines' apparently willful disregard of the Guidelines, and therefore the laws of the several states, my office (together with 6 other attorneys general) sent the major airlines a memorandum dated February 3, 1988, detailing the need to comply with Guideline 2.5. A copy of that memorandum is attached hereto as Exhibit A.

10. In direct response to that memorandum, the General Counsel of the Department of Transportation ("DOT"), Wayne Vance, wrote to me on March 2, 1988. A similar letter went to my fellow attorneys general who were on the February 6 memorandum. A copy of the letter is attached hereto as Exhibit B.

11. In essence, Mr. Vance's letter says that DOT's rule allows separate disclosure of mandatory fees, surcharges, and service charges, citing a 1985 order by DOT (Order 85-12-68) which did indeed allow separate statement of the $3 international departure tax (but no other charge).

12. In his letter, Mr. Vance expressed his opinion that the states were preempted from acting to protect consumers, when the DOT had already taken some form of action. He specifically said that the attorneys general were preempted in their

attempt to require airlines to include surcharges in the fare price quoted.

13. He concluded his letter with a threat to sue the states to prevent our enforcing our own state laws, as reflected in the Guidelines.

14. On March 9, 1988, I wrote to Mr. Vance to respond to his March 2 letter to myself and on behalf of four other attorneys general. My letter is attached as Exhibit C. It reiterates the position of the attorneys general that our actions were not preempted. It also points out to Mr. Vance that our Guideline 2.5 was in full compliance with the actual DOT regulation* and only conflicted to a slight degree with the 1985 Order 85-12-68 (as to the $3 charge).

15. In response to Mr. Vance's request in his March 2 letter for a meeting with the attorneys general, a number of other attorneys general and I met with Mr. Vance and the other DOT staff members in Washington, D.C. on March 14, 1988. During that meeting we discussed in detail the intentions of NAAG in adopting the Guidelines and the intentions of the individual attorneys general to require compliance with our own state laws, as reflected by the Guidelines. The discussion focussed in significant part on Guideline 2.5, and whether or not we were preempted by DOT action to date. We

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* 14 CFR 399.84, enacted by the old Civil Aeronautics Board before it was abolished but now enforced by DOT, provides that it is an unfair or deceptive practice to state a price for air transportation "unless the price stated is the entire price to be paid by the customer to the air carrier, or agent, for such air transportation..."

expressed again our belief that the 1985 Order 85-12-68 certainly did not serve to preempt us.

16. Unbeknownst to the attorneys general at the time, DOT had already quietly adopted the Order made the basis of this action (Order 88-3-25), attached hereto as Exhibit D), four days before our meeting with Mr. Vance and his colleagues. Neither Mr. Vance nor any other staff member then present advised us of the new order, and in my opinion in fact intentionally misled us by failing to disclose that DOT had just taken action that directly related to the matters then being discussed. We subsequently learned of the existence of the Order through other sources, and were never advised by DOT that it had taken this action.

17. It is my opinion that DOT intentionally acted in the dead of the night and with no proper process whatsoever in issuing Order 88-3-25, in an effort to bolster its position that the attorneys general of this country cannot act to protect their citizens from false advertising by the airlines.

18. After the Guidelines became effective and after we sent the airlines the February 3 memorandum (Exhibit A), there were a marked improvement in fare advertisements – surcharges were included in the quoted fare. Since Order 88-3-25 was issued by DOT, we have seen a resumption of advertisements which quote the fare without the $23 surcharge.

19. Inclusion of the surcharges does not impose any additional cost or trouble on the airlines. It is merely a matter a quoting a fare as, for example, $592 rather than 569. It is my opinion that DOT's secretive action encourages the airlines to quote

deceptively and artificially low fares, a practice which is illegal under the laws of Texas and other states.

[Signature and jurat omitted in printing.]

[Exhibit A to Exhibit H to Motion for Temporary Restraining Order]

MEMORANDUM

TO: Airlines and other interested parties

FROM: Attorneys General of Colorado, Kansas, Massachusetts, Missouri, New York, Texas, and Wisconsin

DATE: February 3, 1988

RE: Failure to include surcharges for international departure tax, customs and immigration fee, and security costs in primary fare quote

Violation of state deceptive advertising and trade practice laws

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Recently, it has come to our attention that although most airlines are making a concerted effort to bring their advertisements into compliance with the standards delineated in the National Association of Attorneys General ("NAAG") guidelines for fare advertising, many carriers are still factoring $23 out of the price advertised for international flights. This $23 "surcharge" allegedly represents a $3 departure tax, a $10 customs and immigration fee, and a $10 "security surcharge" (i.e., the increase in the airlines' cost for security). It is alluded to only in the footnote of print advertisements and is not included in broadcast commercials at all.

Guideline 2.5 of the NAAG guidelines states:

> Any fuel, tax, or other surcharge to a fare must be included in the total advertised price of the fare.

As the commentary to this guideline noted, there are sound reasons for this requirement. Last year some carriers attempted to pass along an increase in the cost of fuel as a surcharge separated out from the advertised fare. The potential for abuse if this type of practice is permitted is obvious. Carriers would be free to make their airfares appear lower simply by separating out any part of the price from the advertised fare and including a surcharge in a footnote. This practice with respect to fuel surcharges appears to have ended but the practice of excluding departure tax, customs and immigration fees, and security costs continues.

Whether the hidden charge is for fuel, governmental taxes or fees, or security costs the problem remains the same--the price advertised is not the actual cost of the product and the consumer who responds to the advertised price is misled.

The airline traveller, particularly the infrequent traveller, perceives that a quoted fare includes the entire cost of the ticket, without any later additions. Accordingly, failure to include the departure tax, customs and immigration fees, and security charges has the tendency and capacity to deceive the consumer as to the actual cost of the ticket. Additionally, because some airlines already include these types of surcharges in their advertised round-trip fares, the failure of other airlines to do the same promotes unfair competition in the industry.

The purpose of this memorandum is to clarify for the industry as a whole that, in the opinion of the states signing this memorandum, the failure to include any non-optional costs in the advertised price is a violation of our respective state laws on deceptive advertising and trade practices. In an effort to continue the spirit of cooperation with which the states and the airlines have approached this matter, we elected to send this advisory memorandum before initiating any immediate enforcement actions against specific carriers.

A list of the assistant attorneys general working on this matter is attached for your reference. Please feel free to contact any of them if you have a question or need clarification.

We hope that protracted litigation over this issue will not be necessary and that airlines will discontinue the practice of excluding these surcharges from the advertised price immediately. We ask each airline receiving this memorandum to confirm its intentions with respect to this matter in writing. Please respond by no later than February 10, and direct your letter to:

Stephen Gardner
Assistant Attorney General
714 Jackson Street, Suite 700
Dallas, Texas 75202

This memorandum is being provided to various copy acceptance directors in the media, for assistance in deciding whether to accept specific advertisements.

Thank you for your attention to this matter.

[Exhibit B to Exhibit H to Motion for Temporary Restraining Order]

[Letterhead of U.S. Department of Transportation]

March 2, 1988

Mr. Jim Mattox
Attorney General
P.O. Box 12548
Capitol Station
Austin, Texas 78711-2548

Dear Mr. Mattox:

A recent memorandum from seven Attorneys General to all airlines and interested parties, signed by the Attorneys General of New York, Massachusetts, Kansas, Texas, Colorado, Missouri, and Wisconsin, requests compliance with the section on full price advertising of the Guidelines of the National Association of Attorneys General (NAAG) for air transportation advertising. In addition, we understand that some Attorneys General have contacted airlines to enforce the section on roundtrip pricing of the Guidelines. Both of these matters are clearly preempted by Federal law. The State and Federal governments share the goal of ensuring clear dissemination of airline price information. In our view, however, Congress has made clear that these efforts must be consistent with the mandate of the Airline Deregulation Act to encourage price competition.

The memorandum of the Attorneys General requests that airlines not just include somewhere in the advertisement the amount of mandatory fees, surcharges, and service charges, but instead that they

state a full ticket price in the advertisement that includes all such charges. The Department's rule allows advertisements to list separately the ticket price from other charges. The NAAG Guidelines further require that for fares advertised on a one-way basis that are available only through a roundtrip purchase, the roundtrip purchase price also be listed. The Department's rule does not require the display of the roundtrip fare so long as the advertisement is clear on the roundtrip conditions. Under sections 204 and 411 of the Federal Aviation Act, the Civil Aeronautics Board (CAB), after notice and public comment, adopted a rule (14 CFR 399.84) that requires full price advertising for all components of the advertised air transportation. In consistent interpretations by this Department since assuming jurisdiction from the CAB for this rule, we have specifically permitted the type of advertising to which the Attorneys General object. (*See, e.g.*, Order 85-12-68 (enclosed). By adopting this rule and issuing these interpretations, the Federal government has preempted this aspect of State pricing advertising regulation.

In my opinion, the States may not regulate the advertising of air fares in this manner. Where there is actual conflict with a Federal rule, where there is an irreconcilable difference between the Federal rules and the State provision, or where the State regulation will be an obstacle to the Federal policy in the area, the Federal regulation takes precedence. See *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984); *Fidelity Federal Savings & Loan Ass'n v. De La Cuesta*, 458 U.S. 159(1982).

Also, the United States has entered into air services agreements with more than 80 countries that include detailed provisions on prices, as well as governmental or other authority user charges.

Negotiations with foreign countries about these prices and charges and their advertisement are frequent. In this respect, we consider State advertising regulation in conflict with that of the Federal government to be preempted when the action "prevents the Federal Government from speaking with one voice when regulating commercial relations with foreign governments." *Japan Line Ltd. v. County of Los Angeles*, 441 U.S. 434,451 (1979). Further, Congress has required that user fees for Federal immigration services be separately listed on the ticket (Pub. L. 99-372). This legislation is consistent with our price advertising rule. For these reasons, I believe that the attempt by the Attorneys General to specify how the airlines construct their fare listings, where the Federal government has already so specified, is preempted.

In view of the above, I am asking you and the other Attorneys General not to take further action in this matter that could lead to our being opposing litigants rather than partners without thorough discussion at both State and Federal levels. In this connection, my staff and I would be glad to attend your upcoming NAAG meeting in Washington next month to share our views and to meet with you prior to the initiation of any other State action that could potentially be preempted. If threats to enforce the particular sections of the Guidelines continue, we will be forced to consider taking formal legal action to prevent their enforcement. I am confident that this result can be avoided through constructive and cooperative discussion.

Sincerely,

/s/B. Wayne Vance
General Counsel

Enclosure

cc: Christopher Ames
Deputy Attorney General of
California

UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
WASHINGTON, D.C.

Issued by the Department of Transportation
on the 24th day of December, 1985

Request of the Air Transport Association of America for an exemption from 14 CFR 399.84	Docket 43585
Petition of Balair, AG, et al for emergency rulemaking and 399.80 and 399.84	Docket 43596

ORDER GRANTING EXEMPTION

On November 14, 1985, the Air Transport Association of America (ATA), on behalf of its members, filed a request for an exemption from 14 CFR 399.84, which states the Department of Transportation's policy with respect to price advertising. That section declares that any advertising of flights, tours, or component of tours must state the entire price of the flight, tour, or tour component; failure to comply is an unfair or deceptive trade practice under section 411 of the Federal aviation Act, as amended, 49 U.S.C. 1381 (the Act).[1] ATA asks for an immediate blanket exemption

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[1] When it adopted the price advertising policy statement, the Civil Aeronautics Board (CAB) also amended 14 CFR 380.30. (49 Fed. Reg. 49440 and 49438, December 20, 1984). Responsibility for these regulations transferred to the Department on January 1, 1985.

Part 380, which governs public charters, was amended to require that any solicitation material from a direct or indirect air carrier, or an agent of either, for a charter, charter tour or a charter tour component state the entire price to be paid by the consumer to the seller or agent for the travel purchased or component of the package. These changes were intended to reduce deceptive advertising by charter and tour operators, and direct and indirect air carriers.

with respect to the rule's applicability to air-only scheduled service by direct air carriers, pending initiation of a rulemaking proceeding to amend the regulation. ATA asserts that the rulemaking proceeding conducted in this matter by our predecessor, the Civil Aeronautics Board (CAB), was inadequate to support application of section 399.84 to air-only scheduled service. ATA claims that the thrust of the rulemaking proceeding was directed at charter tour operators, not scheduled air carriers, and that the $3 U.S. departure tax was not at the center of the controversy. Accordingly, it asserts that the air carrier industry had inadequate notice that the rule would apply to air-only scheduled service. ATA further maintains that application to air-only scheduled service i not justified or sensible, because the regulation was intended to curb abuses of the charter tour industry. Logistical problems are also alleged with respect to compliance with the rule.

On November 15, 1985, a group of charter airlines and tour operators (the "Joint Petitioners")[2] filed a petition to review and amend 14 CFR 399.84 and 380.30 to the extent necessary to permit all carriers--scheduled and charter--to advertise air fare and tour prices without international departure taxes, provided such taxes are stated elsewhere within each

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[2] Balair, AG; Charter Travel Corp.; Condor Flugdienst GMBH; DER Travel Service, Inc.; German Charters, Inc.; Homeric Tours; Schwaben Int'l,; Tourlite Int'l, Inc.; Travac Tours and Charters, Inc.; and Travel Impressions, Ltd.

ad and promotional material.[3] They also request interim relief to permit them to advertise in such a manner immediately. In the alternative, they ask that the current regulation be applied to all segments of the industry in a uniform manner. The Joint Petitioners assert that scheduled service operators are not including the tax in their promotional materials, as required by our rule, while the Joint Petitioners are doing so. Thus, they argue, they are at an unfair competitive disadvantage. The Joint Petitioners further state that they do not object to the purpose of the regulation, but believe that the international departure tax is not "central to the substance or spirit" of sections 380.30 and 399.84.

Responsive Filings

Donald L. Pevsner: On November 22, Donald L. Pevsner filed comments in opposition to the requests of both the ATA and the Joint Petitioners. Mr. Pevsner, whose 1982 petition concerning deceptive price advertising practices led to the changes in Parts 380 and 399, argues that the $3 international departure tax should be included in the price of all foreign and overseas air transportation. Mr. Pevsner objects to permitting the $3 fee to be placed at the bottom of an ad in small print. He also alleges that by not including the departure tax in the price, carriers are violating section 411 of the Act and, therefore, should be enjoined from continuing the practice. Mr. Pevsner further argues that any fee included on a passenger's ticket should be included in any advertising.

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[3] On November 18, the Joint Petitioners submitted additional examples of carriers allegedly not in compliance with the regulation.

Joint Petitioners: The Joint Petitioners filed an answer to the ATA request and argue that any relief granted should apply to the entire industry, not just a portion of the industry. They disagree that the air carrier industry had insufficient notice that the rulemaking was intended to apply to all services including scheduled services, since the NPRM indicated that the rule would be applied to all.

Transamerica Airlines: Transamerica, an air carrier with both scheduled and charter operations, filed a consolidated answer expressing support for an exemption for all segments of the industry, not just scheduled carriers. Granting relief only to scheduled air carriers, Transamerica asserts, would give them a competitive advantage and, therefore, any relief should apply to all operations. Transamerica also points out that there have been no complaints about the treatment of the $3 tax in advertisements.

People Express Airlines: People Express, a scheduled carrier, supports ATA and asserts that the industry was not given adequate notice of the handling of the $3 tax during the rulemaking process. It claims that the primary thrust of the changes to Parts 380 and 399 was to curb abuses in the passenger charter and tour package industry.

People Express asserts that there is no basis to support the rule with respect to air-only scheduled service, and that the amount in question is de minimus and regulation is not necessary to protect the public.[4]

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[4] People Express also attached a copy of a letter it sent to the Department which questioned the applicability of the rule and the adequacy of notice. People Express did not include a copy of the response, however.

Carefree David Travel: Carefree David, et al., filed in opposition to the ATA petition and in support of the Joint Petitioners' request.[5] Carefree also notes that the NPRM gave all carriers more than sufficient notice that the proposed rules would apply to all carriers. Carefree further argues that since, as the Department recently recognized in approving "half-round trip" advertising, consumers can distinguish between an advertisement that gives a round-trip price and one that provides a one-way price based on the purchase of a round-trip ticket, consumers similarly should be able to recognize that they must pay the additional $4 tax.[6]

Upon consideration of the petitions and answers, we have decided to grant the request of the Joint Petitioners for an exemption from sections 380.30 and 399.84 to permit the exclusion of the U.S. international departure tax from the total advertised price, provided all advertisements clearly state the amount of tax elsewhere in the ad. If the price advertised does not include the U.S. international departure tax, the ad must indicate that the fee is payable by the customer. This means that the industry is free to advertise its services in a variety of

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[5] Carefree David Travel Co., Inc.,; Emerald Tours, LTD.; Fantasy Holidays, Inc; Ferien-Service, LTD.; Hispanidad Holidays, Inc.; Rich International Airways, Inc.; Samson Tours, Inc.; Spanish Heritage Tours, Inc.; Spantax, S.A.; Trans National Travel, Inc.; Unitravel Corp.; and Vacation Travel Concepts, Inc.

[6] "Half-round trip" advertising enables, for example, a carrier to advertise a fare which can only be purchased as part of a round trip fare, i.e., New York to London - $99 (based on purchase of round-trip ticket).

ways. This exemption should permit greater flexibility for the industry to advertise its services, while ensuring that the traveling public is informed of the charges they must pay to take advantage of the service offered. This exemption applies to all those that offer service involving the $3 tax and not just scheduled carriers.[7] However, failure to include in the total price or disclose the $3 tax separately will continue to be a violation of section 411. We do not believe that other relief, such as amending the regulation, is necessary in light of the exemption granted by this order.

We therefore reject arguments advanced by Mr. Pevsner that allowing the $3 international departure tax to be stated separately is deceptive to the consumer. It has long been a common practice in the industry to state this tax separately, and we have received no complaints from consumers indicating that they have been deceived by advertisements or promotional materials that display the $3 tax clearly but separately. Under the circumstances, we have no basis at this time to conclude that the practice has a significant potential to deceive consumers. However, as noted above, failure to disclose the tax in some form will be considered a violation of section 411. This disclosure can be accomplished in a number of different ways, such as by including it in the generally-larger typeface stating the price of the trip, or by using an asterisk with a notation.

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[7] While the Department agrees with the Joint Petitioners that the scheduled carriers had adequate notice of the effectiveness of section 399.84, the exemption addresses the question on an industry-wide basis, without giving one segment a competitive advantage over another.

Therefore, under the authority delegated to the Assistant Secretary of Policy and International Affairs under 49 CFR 1.56, I:

1. Consolidate dockets 43585 and 43596 into docket 43585

2. Deny the petition of the Air Transport Association of America;

3. Grant the request of the Joint Petitioners for an exemption from the provisions of 14 CFR 380.30 and 399.84, so as to permit direct and indirect air carriers for scheduled and charter service and tour operators to state the United States international departure tax separately from other charges in advertisements and promotional materials provided that all such advertisements clearly state the amount of the tax elsewhere in the advertisement and indicate that it must be paid in addition to the advertised price; and

4. Except to the extent granted herein, deny all other requests in docket 43585.

By: Matthew W. Scocozza
Assistant Secretary for Policy and
International Affairs
SEAL

[Exhibit C to Exhibit H to Motion for Temporary Restraining Order]

[Letterhead of Texas Attorney General]

March 9, 1988

B. Wayne Vance
General Counsel
U.S. Department of Transportation
400 Seventh Street, N.W.
Washington, D.C. 20590

Re: Your March 2 letter regarding surcharges

Dear Mr. Vance:

I am responding to your March 2 letter, on behalf of myself and my fellow Attorneys General in Colorado, Kansas, Massachusetts, and New York, all of whom received similar letters from you.

In short, we continue to support and intend to enforce the National Association of Attorneys General ("NAAG") Guidelines which we adopted last December.

Your letter specifically objects to the requirements of the Guidelines that (1) require all surcharges to be included in the advertised fare, and (2) prohibit advertising one-way fares based on a required round-trip purchase.

We continue to believe that an advertisement should tell the traveller the exact cost of the fare advertised. Allowing airlines to exclude "surcharges" from the advertised fare deceives the public.

Neither of these two Guidelines imposes any additional obligation on the airlines, restricts their creativity, or requires additional disclosure -- complaints which we have heard about other Guideline provisions. In our discussions with the airlines last summer, most airlines told us that they did not object to requirements of this nature -- as long as they were uniformly applied. That is what the Guidelines (and our follow-up memorandum of February 3) accomplish. The Guidelines simply advise the airlines that they must tell their customers the full truth about their fares.

And the airlines are doing so, with no apparent problem. See, for example, the attached advertisements for Southwest Airlines and Pan Am, which appeared locally in January, after the Guidelines took effect (both ads are reduced in size to permit copying).

It is curious that DOT would choose to focus its complaints to us on these particular Guidelines, which are easily met. However, your letter does not really argue that NAAG's Guidelines are either difficult to meet or that they do not help prevent deception. Instead, you have raised again the issue of preemption.

The Guidelines were carefully tailored to avoid the Airline Deregulation Act preemption of state action relating to rates, routes, and services. As you are aware, the leading case on this issue says that nothing in that Act was intended to prevent states from regulating deceptive advertising practices by airlines. People v. Western Airlines, Inc., 155 Cal. App. 3d 597, 202 Cal. Reptr. 237, *cert. denied* 469 U.S. 1132, 105 S.Ct. 815 (1984). See also Brunwasser v. Trans World Airlines, Inc., 541 F.Supp. 1338 (W.D.

Pa. 1982), which holds that the Act does not preempt a private citizen's action for deceptive practices under Pennsylvania's consumer protection law.

Further, you have offered no legal basis to establish that enforcement of these two Guideline is preempted, except an agency decision permitting airlines to factor out a $3.00 departure tax. DOT's own regulations in fact require that all surcharges be included in the full advertised fare. We therefore conclude that the Act itself does not preempt our enforcement of the Guidelines.

Preemption may also occur if Congress evidences an intent for the federal government to occupy the entire field. Congress had that opportunity to do so in the Deregulation Act and chose in fact to provide limited preemption -- not the entire field of regulating the practices of airlines. We concede that the Department is by law, and should be in practice, the primary regulator of the airlines' practices. The real problem here is that the Department, instead of acting to protect consumers, has instead chosen inaction. In your letter, you suggest that the Department's inaction in this area preempts state action. This assertion is untenable.

If the Department had acted within its mandate to protect consumers, there would have been no need for the Guidelines. However, through its inaction, the Department has created a void which was filled by the state attorneys general acting to protect their citizens from deceptive practices by the airlines. We will continue to act to protect our citizens.

Your letter closes with a threat of formal legal action to prevent us from enforcing the Guidelines. We question how such an aggressive position taken

against the sovereign states can possibly comply with President Reagan's Executive Order 12612 (October 26, 1987) on federalism and preemption.

We do not seek confrontation with the Department. We do not desire to engage in baseless litigation brought by the Department. But threats to sue us will not chill our efforts to fulfill our own duties to protect our citizens.

It is our understanding that we will be meeting with you next Monday, March 14. We look forward to a productive meeting.

Very truly yours.

/s/JIM MATTOX
Attorney General of Texas

[Exhibit D to Exhibit H to Motion for Temporary Restraining Order]

Order 88-3-25

UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, D.C.

Issued by the Department of Transportation
on the 10th day of March, 1988

SERVED MARCH 16, 1988

Amendment of exemption to allow separate listing of service fees in advertisements for air transportation. — Docket 43585 43596

ORDER AMENDING EXEMPTION

On December 20, 1984, the Civil Aeronautics Board (CAB) adopted the price advertising policy statement, 14 CFR 399.84, declaring that any advertising of flights, tours, or components of tours must state the entire price of the flight, tour, or tour component; failure to comply is an unfair or deceptive practice within the meaning of section 411 of the Federal Aviation Act, as amended, 49 U.S.C. 1381 (the Act)[1]

[1] When it adopted the price advertising policy statement, the Civil Aeronautics Board (CAB) also amended 14 CFR 380.30. (49 Fed. Reg. 49440 and 49438, December 20, 1984). Responsibility for these regulations transferred to the Department on January 1, 1985. Part 380, which governs public charters, was amended to require that any solicitation material from a direct or an indirect air carrier, or agent of either, for a

This order amends an exemption from that rule. The amendment allows advertisers to separately list certain service fees and taxes in advertisements as long as the amounts of each charge are listed separately or in total.

BACKGROUND

On November 15, 1985, a group of charter airlines and tour operators (Joint Petitioners)[2] filed a petition with the Department of Transportation to review and amend 14 CFR 399.84 and 380.30 to the extent necessary to permit air carriers – scheduled and charter – to advertise air fare and tour prices without international departure taxes, provided such taxes are stated elsewhere within each ad and promotional material. On December 24, 1985, the Department issued Order 85-12-68, granting an exemption from the provisions of 14 CFR 380.30 and 399.84, so as to permit direct and indirect air carriers for scheduled and charter service and tour operators to state the United States international departure tax separately from other charges in advertisements and promotional materials, provided that all such advertisements clearly state the amount of the tax elsewhere in the advertisement and indicate that it must be paid in addition to the advertised price.

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charter tour or a charter tour component state the entire price to be paid by the consumer to the seller or agent for the travel purchased or component of the package. These changes were intended to reduce deceptive advertising by charter and tour operators, and direct and indirect air carriers.

[2] Balair, AG; Charter Travel Corp.; Condor Flugdienst GMBH; DER Travel Service, Inc.; German Charters, Inc.; Homeric Tours; Schwaben Int'l., Inc; Tourlite Int'l., Inc.; Travac Tours and Charters, Inc.; and Travel Impressions, Ltd.

Since the grant of the exemption in late December 1985, there has been a proliferation of other fees and charges, some suggested and imposed by airlines, but most charged for services provided by various U.S. government agencies. In some international markets, there is a security fee for each flight to the United States. In addition, the U.S. government has imposed a $5 customs fee and a $5 immigration fee, and a $1 tourism fee has been proposed for certain international flights. Some States and municipalities have imposed fuel surcharges of varying amounts to ticket charges.

For advertisers to comply literally with current provisions of sections 380.30 and 399.84, the are obligated to include the total cost of all such fees and charges in the advertised price. Advertisers find this difficult because they often advertise the each-way fare and state that roundtrip purchase is necessary to use the advertised price. However, security charges do not apply in all international markets, and immigration and custom fees apply only on the return segment of the trip. Fuel surcharges generally apply only on the flight leaving the State or city making such an assessment and not on the return.

As a result of the variety of additional fees and charges imposed on air travelers for a variety of services, advertisers are confused as to how the charges for such services must be presented (including the charges in the total advertised price for the reasons stated above) and in many instances, readers are not receiving the true picture of what their trip will cost. Some advertisers are stating the total amount of additional charges separately and identifying them as departure tax, custom fees,

immigration fees, etc. Some advertisers are stating the total additional charge separately and merely identifying it as "tax and services." Still others do not state an additional charge separately but merely include the statement that "tax and service charges are not included." Finally, some advertisers make no mention of the additional fees and charges at all. In many cases, readers are not aware of significant additional charges until after they have made their decision to travel based upon the only price stated.

AMENDMENT OF EXEMPTION

We want to continue to allow the industry the freedom to advertise its services in a variety of ways and we want to encourage open price competition. However, we must also ensure that the traveling public is informed of the total amount of charges they must pay to take advantage of services offered. We believe this can best be accomplished in a fashion similar to that involving the $3 U.S. departure tax and mandatory service packages.

We have decided to amend the exemption from sections 380.30 and 399.84 in Order 85-12-68 to permit the exclusion of foreign departure taxes (if collected by the advertiser), customs fees, immigration fees, security fees, agriculture inspection fees, tourist and fuel surcharges and any other surcharges that may be imposed by the U.S. Federal, State or local governments or foreign governments, from the total advertised price, provided all advertisements clearly identify and state the amount of the charges elsewhere in the ad, as a total or separately.

The cost of such surcharges may be included in the total advertised price. If so, the advertiser would not be required to list the charges separately but could

state that they are included. However, if the total advertised prices does not include all amounts for such charges, the cost must be stated clearly and conspicuously elsewhere in one of two ways. First, the total of the additional charges may be stated as one amount, so long as the kinds of charges covered by that amount are itemized. Or if the advertisers choose, they may state separately each of the charges provided and the individual amount for each. The ad must clearly indicate that the additional charges are payable by the customers.

As long as the charges for such services are stated and the services are identified, readers should readily know what they will pay for their complete transportation package. Separate itemization is already required for services comprising "mandatory" package supplements and other special services under our rules. Such disclosure appears to cause no particular compliance problems for advertisers, and, at the same time, we have received few complaints from consumers indicating that they have been deceived by advertisements or promotional materials that in fact identify special services and display the additional charges separately in legible type. We therefore have no basis at this time to deny adequate separate disclosure as a practical remedy to a growing travel industry problem. Nevertheless, failure to disclose all additional costs clearly and conspicuously will be considered an unfair and deceptive practice in the sale of transportation within the meaning of section 411 of the Federal Aviation Act. This disclosure can be accomplished, for example, by including the additional costs in the generally-larger typeface stating the price of the trip or by using an asterisk with a notation showing the total cost of the

additional charges with the kind of charges itemized, or the charges can be stated with each cost presented separately.

ACCORDINGLY:

1. The exemption from the provisions of 14 CFR 380.30 and 399.84 granted in Order 85-12-68 is amended to permit direct or indirect air carriers for scheduled and charter service, including tour operators, to state foreign departure taxes, security charges, custom fees, immigration fees, security fees, agricultural inspection fees, tourism and fuel surcharges, as well as any other surcharges (when these items are collected by offeror) that may be imposed by the U.S. Federal, State or local governments or foreign governments, separately from other charges in advertisements and promotional materials, provided that all such advertisements clearly and conspicuously state elsewhere in the advertisement the amount of such charges and the services such charges cover and indicate that such charges must be paid by the consumer in addition to the advertised price.[3]

2. This amendment becomes effective 30 days after the service date of this order.

By: MATTHEW V. SCOCOZZA
Assistant Secretary for Policy
and international Affairs

(SEAL)

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[3] This action in no way alters the exemption already granted with respect to the $3 U.S. departure tax.

[Title omitted in printing.]

AFFIDAVIT FOR AUTHENTICATION OF BUSINESS RECORDS

STATE OF TEXAS §
§
COUNTY OF DALLAS §

BEFORE ME, the undersigned authority, personally appeared Sterling Mayes, who, being by me duly sworn, deposed and said:

1. My name is Sterling Mayes. I am over 18 years of age, of sound mind, capable of making this affidavit, and personally acquainted with the facts stated in it.

2. I am the office manager of the Dallas Regional Office of the Texas Attorney General and as such I am custodian of the records of the Attorney General attached to this affidavit.

3. The records attached to this affidavit, consisting of 8 pages, are letters sent or received by the Attorney General in the regular course of its business. It was the regular course of that business for an employee or representative of the business with knowledge of the act, event, condition, opinion or diagnosis recorded to file the letters. The records attached hereto are exact duplicates of the originals.

4. These 8 pages consist of 6 letters, as follows:

a. June 12, 1987 letter from Stephen Gardner, Assistant Attorney

General, to Tom Ahlf, Assistant General Counsel, Trans World Airlines, Inc. (mailed by this office on that date)

b. June 12, 1987 letter from Stephen Gardner to Charles Goolsbee, General Counsel, Texas International Air (mailed by this office on that date)

c. June 22, 1987 letter from Richard Anderson, Corporate Attorney, Continental Airlines, to Stephen Gardner (received by this office on June 24, 1987)

d. February 11, 1988 letter from Thomas J. Ahlf, Assistant General Counsel, Trans World Airlines, Inc., to Stephen Gardner (received by this office on February 16, 1988)

e. June 9, 1988 letter from Stephen Gardner to John Williams, Continental Airlines (mailed by this office on that date)

f. December 14, 1988 letter from Karen K. Crider, U.S. Counsel, British Airways Plc., to Stephen Gardner (received by this office on December 14, 1988)

[Signature and jurat omitted in printing.]

[Letterhead of Texas Attorney General]

June 12, 1987

VIA FEDERAL EXPRESS

Tom Ahlf, Esq.
Assistant General Counsel
Trans World Airlines, Inc.
605 Third Avenue, 43rd Floor
New York, New York 10158

Dear Mr. Ahlf:

I am writing as a follow-up to our telephone conversation on June 10.

As I told you then, Texas Attorney General Jim Mattox and other state attorneys general are concerned that the fuel surcharge should not be applied in a deceptive manner.

Specifically, I am writing to advise that failure to include any surcharge in the fare price advertised or quoted will be viewed by this office as a false, misleading, and deceptive practice, in violation of the Texas Deceptive Trade Practices -- Consumer Protection Act, Texas Business and Commerce Code Sections 17.41 et seq. ("DTPA").

Disclosure of the surcharge other than in the fare price will not suffice. For example, it would violate the DTPA to advertise a $99.00 one-way fare from Dallas to New York City, only to add a $6.00 fuel surcharge which is disclosed in a footnote or elsewhere in the advertisement.

This letter does not constitute a finding that your airline has already violated the DTPA. Rather, it

is sent in an effort to avoid future violations. This same letter is being sent today to all major airlines operating in Texas which are known to be considering fuel surcharges.

If you have any questions regarding our policy in this matter, please feel free to telephone me at (214) 742-9698.

Thank you in advance for your cooperation.

Very truly yours,

/s/STEPHEN GARDNER
Assistant Attorney General

[Letterhead of Texas Attorney General]

June 12, 1987

VIA FEDERAL EXPRESS

Charles Goolsbee, Esq.
General Counsel
Texas International Air
333 Clay Street
Houston, Texas 77002

Dear Mr. Goolsbee:

Recently, many of the nation's airlines have raised the possibility of adding a fuel surcharge to airfares this summer. Your airline has been identified as considering this move.

Texas Attorney General Jim Mattox and other state attorneys general are concerned that the fuel surcharge should not be applied in a deceptive manner.

Specifically, I am writing to advise that failure to include any surcharge in the fare price advertised or quoted will be viewed by this office as a false, misleading, and deceptive practice, in violation of the Texas Deceptive Trade Practices -- Consumer Protection Act, Texas Business and Commerce Code Sections 17.41 et seq. ("DTPA").

Disclosure of the surcharge other than in the fare price will not suffice. For example, it would violate the DTPA to advertise a $99.00 one-way fare from Dallas to New York City, only to add a $6.00 fuel surcharge which is disclosed in a footnote or elsewhere in the advertisement.

This letter does not constitute a finding that your airline has already violated the DTPA. Rather, it is sent in an effort to avoid future violations. This same letter is being sent today to all major airlines operating in Texas which are known to be considering fuel surcharges.

If you have any questions regarding our policy in this matter, please feel free to telephone me at (214) 742-9698.

Thank you in advance for your cooperation.

Very truly yours,

/s/STEPHEN GARDNER
Assistant Attorney General

[Letterhead of Continental Airlines]

June 22, 1987

Mr. Stephen Gardner
Assistant Attorney General
State of Texas
714 Jackson, Suite 700
Dallas, Texas 75202

Dear Mr. Gardner:

This is to acknowledge receipt of your letter dated 12 June 1987 to Mr. Charles Goolsbee of Texas Air Corporation regarding fuel surcharges contained in airfare advertisements. Your letter was forwarded to the undersigned for disposition.

At this time, Continental Airlines will include any fuel price increase in the quoted fare; it will not be disclosed in a footnote as a fuel surcharge. Nonetheless, we do not concede to the position stated in your letter for several reasons.

Your letter was premature, in that no public advertisement had been made regarding fuel price increases. While we appreciate your cooperative and candid comments, it is not reasonable to allege a very serious violation of V.T.C.A., Bus. & C., Section 17.41 et seq., without first having actually reviewed the advertisement. In our opinion, a prominently displayed footnote adding the fuel surcharge or any number of other straight forward and clearly stated methods could be employed without being false or misleading.

The advertising practice of including additional charges by way of footnote to the stated price is a prevalent practice both within and without

the airline industry. Specifically within the airline industry, several airports in the U.S. assess a surcharge for each passenger; this surcharge is commonly advertised by way of a footnote, as are departure and custom taxes. Likewise, a quick review of any local newspaper will reveal similar advertising practices in the automobile industry. Footnotes to stated prices indicate that charges will be added for taxes, title, licenses, dealer preparation, or that the final purchase price may be different than the advertised price. As you well know, the actual price is likely to be several thousand dollars more than the stated price.

Therefore, we believe that the advertising of fares with footnoted surcharges, when prominently and openly displayed, are common methods of advertisement which are familiar and fair to consumers.

Finally, your letter assumes that the State of Texas has the authority to regulate an interstate air carrier licensed under the Federal Aviation Act as amended, 49 U.S.C.A. §1301 et seq., (hereinafter referred to as the "Act"). We respectfully submit the State of Texas is preempted from regulating the advertising practices of Continental Airlines or any other airline subsidiary of Texas Air Corporation.

Section 105(a) of the Act, provides in pertinent part:

FEDERAL PREEMPTION

> (1) Except as provided in paragraph (2) of this subsection, no state or political subdivision thereof and no interstate agency or other political agency of two or more states shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier having authority under subchapter IV of this chapter to provide air transportation. (Emphasis added).

In granting exclusive regulatory authority over the airline industry to the Federal Government, Congress gave the Department[1] specific, statutory guidelines to regulate advertising practices. The following statutory provisions have nearly identical language to the DTPA, supra, and seek to prohibit the same practices encompassed by state law.

The Act, 49 U.S.C.A. §1302(a)(3) provides the broad policy directives of airline regulation including:

> [Provision for] the availability of a variety of adequate, economic, efficient,

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[1] The authority to regulate the airline industry was transferred to the Department of Transportation upon abolition of the Civil Aeronautics Board. See 49 U.S.C.A. §1551, Subsection (b)(1)(E) which provides, "All authority of the Board under this chapter which is not terminated. . .is transferred to the Department of Transportation".

> and low price services by air carriers and foreign air carriers without . . . unfair or deceptive practices. (Emphasis added).

Additionally, 49 U.S.C.A §1381(a) (see cases cited thereunder) provides specific enforcement authority to the DOT:

> The board may, upon its own initiative . . . if it considers that such action by it would be in the interest of the public, investigate and determine whether any air carrier . . . has been or is engaged in unfair or deceptive practices or unfair methods of competition in air transportation or the sale thereof. (Emphasis added)

The clear import of these statutory provisions is to place exclusive regulatory authority over all airline "rates, routes, and services", with the Federal government. Congress sought to prevent a myriad of conflicting regulatory schemes by state government after the retreat of the Federal government from virtually complete operational control of "rates, routes, and services". Your seeking to impose state regulation over matters relating to rates and services would frustrate the desire of Congress for:

> The encouragement, development, and maintenance of an air transportation system relying on actual and potential competition to provide efficiency, innovation, and low prices, and to determine the variety, quality, and price of air transportation services. 49 U.S.C.A. §1302(a)(q).

In conclusion we strongly urge that any state regulation of our advertising practices by the Texas Attorney General's Office would be improper under Federal Law and that your specific complaint regarding fare surcharges is groundless. We offer these comments in a spirit of frank and open communication; please feel free to contact the undersigned regarding this matter.

Very truly yours,

/s/Richard Anderson
Corporate Attorney

cc: Ben Hirst
Charles Goolsbee
Jim O'Donnell
Richard Metzner

[Letterhead of Trans World Airlines]

February 11, 1988

Stephen Gardner, Esq.
Assistant Attorney General
714 Jackson Street
Suite 700
Dallas, Texas 75202

Dear Mr. Gardner:

Please excuse my slightly tardy response to your letter dated February 3, 1988, which the U.S. Postal Service was apparently reluctant to relinquish

Guideline 2.5 of the NAAG guidelines is a verbatim repetition of guideline 1.9 of the draft guidelines circulated last fall. The U.S. Department of Transportation, in its comments on the initial guidelines, clearly stated its view of guideline 1.9:

> Subsections 1.9 and 1.10, requiring surcharges to be included in the total price advertised and prohibiting advertisement of one-way fares based on roundtrip purchase only, respectively, are also in conflict with Federal rules. The Department rule on price advertising is in 14 CFR 399.84. That rule and Department interpretations of it allow separate disclosure of defined surcharges and the advertisement of one-way fares if the restriction on roundtrip-only purchase is disclosed. We believe the Guidelines are thus preempted in this area.

In light of those comments, TWA finds the case for preemption of guideline 2.5 to be particularly compelling. Accordingly, although we have sought and will continue to seek to cooperate with NAAG in order to ensure that TWA's advertisements are nondeceptive and fairly portray the services offered by TWA, we cannot concur in the apparent view of the seven states listed in your letter that guideline 2.5 has somehow escaped preemption. We would, however, welcome any explanation of the reasoning and precedent upon which you have relied in concluding that there has been no preemption. TWA's current understanding is that guideline 2.5 appears to be a decidedly inappropriate vehicle for the type of joint enforcement approach embodied in your letter of February 3.

Very truly yours,

/s/Thomas J. Ahlf

[Letterhead of British Airways]

BY TELEFAX
AND REGISTERED MAIL
RETURN RECEIPT REQUESTED

December 14, 1988

Stephen Gardner, Esq.
Assistant Attorney General
The Attorney General of Texas
714 Jackson, Suite 700
Dallas, Texas 75202

Re: Disclosure of Fare Surcharges in Advertisements

Dear Mr. Gardner:

British Airways has considered your letters of November 14 and December 9, 1988 advising us of your intention to take legal action against British Airways unless British Airways discontinues its current method of advertising fares. As you noted in your letter of November 14, British Airways' disclosure of fare surcharges has been consistent with the regulations of the United States Department of Transportation. Notwithstanding the federal regulation in this area, you have advised us that you intend to take legal action against British Airways because our advertisements do not comply with what you represent to be the laws of the states of California, Massachusetts, New York, Texas and Washington.

British Airways believes that state law in this area has been preempted by the Federal Aviation Act of 1958 and regulations promulgated by the

Department of Transportation. Without prejudice to this position, however, British Airways will discontinue its planned fare advertising and will either refrain from fare advertising or will comply with your requirements for disclosure of fare surcharges until such time as your requirements are changed or there is a determination that state law is preempted or the states are otherwise without jurisdiction.

Sincerely,

/s/Karen K. Crider
U.S. Counsel
(718) 397-4250

[Certificate of Service omitted in printing.]

[Title omitted in printing.]

DEFENDANT'S ORIGINAL ANSWER

TO THE HONORABLE JUDGE OF SAID COURT:

Comes now, Defendant, Jim Mattox, Attorney General of the State of Texas, and files this his Original Answer and would respectfully show the Court the following:

THE PARTIES

1. Defendant admits the first sentence of Paragraph 1. Defendant admits the second sentence of Paragraph 1 except that Defendant is without knowledge or information sufficient to form a belief as to the truth of the averment that TWA is a "certified air carrier," and Defendant specifically denies TWA's characterization of regulation by the Department of Transportation ("DOT") as "extensive." Defendant admits the third sentence of Paragraph 1.

2. Defendant admits the first sentence of Paragraph 2. Defendant admits the second sentence of Paragraph 2 except that Defendant is without knowledge or information sufficient to form a belief as to the truth of the averment that a continental is "certificated air carrier", and Defendant specifically denies Continental's characterization of regulation by the DOT as "extensive." Defendant admits the third sentence of Paragraph 2.

3. Defendant admits the first sentence of Paragraph 3. Defendant admits the second sentence of Paragraph 3 except that Defendant is without

knowledge or information sufficient to form a belief as to the truth of the averment that British Airways is a "holder of a foreign air carrier permit," and Defendant specifically denies British Airway's characterization of regulation by the DOT as "extensive." Defendant admits the third sentence of Paragraph 3.

4. Defendant admits the first sentence of Paragraph 4. Defendant denies the second sentence of Paragraph 4 but admits that pursuant to the provisions of the Texas Deceptive Trade Practices Act, the Consumer Protection Division of the Office of the Attorney General, acting in the name of the State of Texas, is responsible for enforcing the various provisions of Texas law made an issue by Plaintiffs.

5. Defendant denies the allegations of Paragraph 5.

6. As to the first sentence of Paragraph 6, Defendant denies that venue is properly laid before this Court, but admits that he is a resident of and maintains an office in the Western District of Texas. Defendant further denies that Plaintiffs' claims for relief arose in this district, because all the actions upon which Plaintiffs base their claims for relief were taken by a member of the Consumer Protection Division acting in the name of the State of Texas at the Office of the Attorney General located in Dallas, Texas, which is in the Northern District of Texas. Defendant admits the second sentence of Paragraph 6. Defendant denies the third sentence of Paragraph 6.

7. As to Paragraph 7, Defendant denies that any threatened implementation or enforcement of the guidelines is unconstitutional as applied to Plaintiffs' conduct relating to rates, routes or services,

including their advertising and marketing practices thereto, with specific reference to the advertisement of fuel, tax and other surcharges. Defendant admits that Plaintiffs are seeking a declaratory judgment and preliminary and permanent injunctive relief. Defendant denies that Plaintiffs are entitled to a declaratory judgment or any preliminary or permanent injunctive relief.

8. Defendant admits that pursuant to the Federal Aviation Act, the DOT and its predecessor the Civil Aeronautics Board ("CAB") have promulgated rules and regulations governing activities related to air transportation by air carriers and foreign air carriers. Defendant denies that these rules and regulations were "extensive". Defendant admits that the CAB has promulgated a rule and/or regulation which relates to unfair deceptive practices in the airline industry, including standards governing price advertising. Defendant denies that the DOT has promulgated any rule or regulation which relates to unfair and deceptive practices. Defendant denies the remainder of Paragraph 8.

9. Defendants admits that Congress granted the CAB the authority to consider, as being in the public interest, the "prevention of unfair, deceptive, predatory, or anticompetitive practices in air transportation . . . ." Defendant denies the characterization by Plaintiffs that "Congress expressly granted the CAB the authority to promote the public interest." Defendant admits that Congress authorized the CAB in Section 411 of the Federal Aviation Act to determine whether any air carrier or foreign air carrier "has been or is engaged in unfair or deceptive practices or unfair methods of competition in air transportation or the sale thereof, and that in the

event the CAB finds that a carrier "is engaged in such unfair or deceptive practices or other unfair methods of competition, it shall order such air carrier to cease and desist . . . ." Defendant denies all remaining portions of Paragraph 9.

10. Defendant admits Paragraph 10.

11. Defendant admits the first sentence of Paragraph 11. Defendant denies the second sentence of Paragraph 11. Defendant admits the quotations from the legislative history contained in the third and fourth sentences of Paragraph 11, but denies any inferences drawn therefrom and denies Plaintiffs' characterizations of the meaning of those quotations.

12. Defendant admits the first sentence of Paragraph 12. Defendant denies the second and third sentences of Paragraph 12 but admits that in June 1987, Defendant co-sponsored a resolution directing the NAAG Consumer Protection Committee to designate a task force of states to study the air travel industry to determine the extent and nature of practices that are unfair or deceptive and directing the task force to present its findings along with an recommended course of action at the next NAAG meeting in December 1987.

13. Defendant admits the first and second sentences of Paragraph 13. A complete copy of the Guidelines can be found at ANTITRUST AND TRADE REGULATION REPORT (BNA) Vol. 53, No. 1345 at S-2 (December 17, 1987). As to the third sentence, Defendant denies Plaintiffs' characterization of the purpose and effect of the Guidelines as the purpose and effect of the guidelines is clearly stated in the Guidelines themselves.

14. Defendant admits the first sentence of Paragraph 14. Defendant denies the second sentence of Paragraph 14. Defendant admits that the statements attributed to the Federal Trade Commission in the third sentence of Paragraph 14 are accurate, but denies any inferences to be drawn therefrom. Similarly, Defendant admits that the statements attributed to the DOT in the last sentence of Paragraph 14 are accurate but denies any inferences to be drawn therefrom.

15. Defendant admits Paragraph 15.

16. Defendant admits the first sentence of Paragraph 16. Defendant further admits that the Guidelines concern in part disclosures in fare advertisements of material conditions connected with the purchase of tickets, concern in part terms and conditions of frequent flyer programs, and concern in part terms and conditions of incentives offered to induce passengers to give up their seats on overbooked flights. Defendant denies that the Guidelines "require," "specify," "purport to regulate," and "direct" any actions by airlines. Defendant denies the remainder of Paragraph 16.

17. Defendant admits the first sentence of Paragraph 17. Defendant denies the second sentence of Paragraph 17. Defendant admits that various state attorneys general have taken the position that the Guidelines are proper interpretations of their existing state laws and have further taken the position that they will enforce their existing state laws against air carriers, but Defendant otherwise denies the third sentence of Paragraph 17.

18. Defendant admits that state attorneys general have taken action to enforce compliance with their state laws with respective to full price advertising and roundtrip price advertising by airlines, but denies that these actions were seeking to enforce compliance with the sections of the Guidelines. Defendant admits the remainder of the first sentence of Paragraph 18, but denies any inferences to be drawn therefrom. Defendant also admits the second sentence of Paragraph 18 but also denies any inferences to be drawn therefrom. Defendant denies the third sentence of Paragraph 18 because its averments are too general to permit Defendant to form a belief as to the truth of the averments.

19. Defendant admits that he has indicated an intent to take enforcement action with respect to certain aspects of fair advertising which are illegal under Texas law, but denies that he has indicated an intent to "take enforcement action implementing the Guidelines' fair advertising provisions," and further denies the remainder of the first sentence of Paragraph 19. Defendant admits that the Consumer Protection Division of the Attorney General's Office, acting in the name of the State of Texas, has given the notice required by the Deceptive Trade Practices Act to the three plaintiff airlines. Defendant denies that this action by the Consumer Protection Division was in Defendant's official capacity. Defendant can neither admit or nor deny the statement in Paragraph 19 that this action was "in concert with other state attorneys general" because that averment has not been specifically pleaded in a manner sufficient to permit Defendant to form a belief as to the truth of the averment. Defendant denies that he

has threatened to institute enforcement proceedings against Plaintiffs if their advertising practices do not conform to the Guidelines, and otherwise denies the remaining portions of the first and second sentences of Paragraph 19. Defendant admits the content of the third sentence of Paragraph 19, together with the parenthetical fourth sentence, but denies any inference to be drawn therefrom. Defendant denies the final sentence of Paragraph 19.

20. As to the first sentence of Paragraph 20, Defendant denies that Mr. Gardner's letter indicated that the states would initiate enforcement actions under their respective laws, admits that he did notify the airlines that the states might initiate enforcement actions, and otherwise denies the averments in that sentence. Defendant admits the second sentence of Paragraph 20. Defendant admits the last sentence of Paragraph 20, but denies any inferences to be drawn therefrom.

21. Paragraph 21 is a reallegation of Paragraph 1 through 20 which have been admitted or denied above.

22. Defendant admits Paragraph 22.

23. Defendant denies Paragraph 23.

24. Defendant admits Paragraph 24.

25. Defendant admits Paragraph 25.

26. Defendant denies Paragraph 26.

27. Defendant denies the first sentence of Paragraph 27. Defendant admits that the DOT's general counsel has informally expressed an opinion that aspects of the regulation of deceptive or unfair advertising practices by airlines was preempted, but

denies any inference to be drawn therefrom and further denies that there is any legal effect by this proclamation. Defendant otherwise denies the remainder of Paragraph 27.

28. Defendant denies Paragraph 28.

29. Defendant denies the first, third, fourth, and fifth sentences of Paragraph 29. Defendant can neither admit nor deny the second sentence of Paragraph 29 because Plaintiffs have not specified the source of their reference with sufficient specificity to permit Defendant to form a belief as to the truth of the averment.

30. Defendant denies Paragraph 30.

31. Defendant denies Paragraph 31.

32. Defendant denies the first sentence of Paragraph 32. Defendant denies the second sentence of Paragraph 32 for the reason that the underlying provision of federal law cited by Plaintiffs, 49 U.S.C. §1373, ceased to be in effect on January 1, 1983, pursuant to 49 U.S.C. §1551(a)(2)(A).

33. Defendant denies Paragraph 33.

34. Defendant denies Paragraph 34.

35. Paragraph 35 is a reallegation of Paragraphs 1 through 34 which have been admitted or denied above.

36. Defendant admits Paragraph 36.

37. Defendant denies Paragraph 37.

38. Defendant denies Paragraph 38.

39. Defendant denies all of Paragraph 39 except the averment that the Attorney General of New Mexico "objects to the Guidelines."

40. Defendant denies Paragraph 40.

41. Defendant denies Paragraph 41.

42. Defendant denies Paragraph 42.

43. Defendant is without knowledge or information sufficient to form a believe as to the truth of the averments in Paragraph 43.

44. Defendant denies Paragraph 44.

45. Defendant denies Paragraph 45.

46. Defendant denies Paragraph 46.

47. Paragraph 47 is a reallegation of Paragraphs 1 through 46 which have been admitted or denied above.

48. Defendant admits Paragraph 48.

49. Defendant denies Paragraph 49.

50. Defendant denies Paragraph 50.

51. Paragraph 51 is a reallegation of Paragraphs 1 through 50 which have been admitted or denied above.

52. Paragraph 52 contains legal argument and no factual averments. To the extent necessary, Defendant denies any factual averments in Paragraph 52.

53. Paragraph 53 contains legal argument and no factual averments. To the extent necessary,

Defendant denies any factual averments in Paragraph 53.

54. Defendant denies Paragraph 54.

55. Defendant denies Paragraph 55.

56. Defendant denies Paragraph 56.

57. Defendant denies Paragraph 57.

58. Defendant denies Paragraph 58.

To the extent necessary, Defendant denies all other factual averments contained in any unnumbered paragraph of the Complaint and specifically deny that Plaintiffs are entitled to any relief sought in their Complaint.

AFFIRMATIVE DEFENSES

1. Defendant asserts that this Court is without subject matter jurisdiction over Plaintiffs' Complaint.

[Signatures and certificate of service omitted in printing.]

[Title omitted in printing.]

MOTION OF PAN AMERICAN WORLD AIRWAYS, INC. FOR LEAVE TO INTERVENE

Pan American World Airways, Inc. ("Pan Am") files this Motion for Leave to Intervene in this action, and in support thereof would show the following:

1. The three existing plaintiffs in this action seek declaratory and injunctive relief regarding the actions of Attorney General Jim Mattox, and those in active concert or participation with him, in attempting to enforce through state law the Air Travel Industry Enforcement Guidelines ("Guidelines") which have been promulgated by the National Association of Attorneys General ("NAAG"). These Guidelines purport to regulate the advertisement of rates, routes and services not only by the named plaintiffs, but also by Pan Am and other similarly situated air carriers. Pursuant to the Federal Aviation Act of 1958 as amended, 49 U.S.C. §§1301 et seq., Pan Am and the named plaintiffs all look to the U.S. Department of Transportation (DOT) rather than to the individual states, for what constitutes permissible and non-deceptive advertising practices.

2. This Court has previously granted to the named plaintiffs a preliminary injunction which specifically provides as follows:

> It is further ORDERED that the Attorney General of the State of Texas, Jim Mattox, individually and in his official capacity, and all other persons

> acting for the Attorney General in either capacity, and all other persons acting in concert or participation with Attorney General Mattox or on his behalf, and all other persons having actual knowledge of this Order, be and hereby are ENJOINED from:
>
> > Initiating any enforcement action pursuant to Tex. Bus. & Comm. Code §§ 17.41 et seq., or any other provision of state law, which would seek to regulate or restrict any aspect of the individually named plaintiff airlines' air fare advertising or the operations involving their rates, routes and/or services.

Order of January 30, 1989, at 2-3 (emphasis added).

3. Although the named plaintiffs enjoy this protection, Pan Am does not. In fact, Pan Am has been threatened with enforcement actions not only by Attorney General Mattox, but also by the Attorneys General of four other states on whose behalves Mr. Mattox's office apparently acts. See Affidavit of John M. Bloodworth at ¶ 6 (attached as Exhibit A and incorporated herein by reference). Therefore, Pan Am is exposed to selective enforcement actions by Attorney General Mattox which violate the spirit, although not the letter, of this Court's preliminary injunction.

4. On February 28, 1989, Attorney General Mattox fulfilled his earlier threat and filed suit against Pan Am in the 101st District Court of Dallas County, Texas, under Cause No. 89-2510-E, styled

State of Texas v. Pan American World Airways, Inc. (A certified copy of Plaintiff's Original Petition in that suit is attached as Exhibit B.) In that Texas state court action, the Attorney General seeks to enjoin Pan Am and to collect damages from Pan Am for advertising its air fares in conformity with DOT's regulations, because such advertising allegedly violates Tex. Bus. & Com. Code §§17.41 et seq. Whether Texas, through Attorney General Mattox, has the authority to regulate such advertising or has been pre-empted from such efforts by the Federal Aviation Act is an issue at the very heart of this proceeding. On March 14, 1989, Pan Am removed the state action to the United States District Court for the Northern District of Texas, Cause No. CA3-89-0713-H.

5. As evidenced by the fact that Attorney General Mattox has initiated an action against Pan Am in Texas state court, none of the litigants presently before this Court are situated so as to adequately protect Pan Am's interest, which may be fundamentally affected by the outcome of this proceeding.

6. The inability of the present named plaintiffs to adequately represent Pan Am's interests is further evidenced by pleadings which Attorney General Mattox has filed in this action, wherein Attorney General Mattox admitted that the present named plaintiffs are not adequately situated to represent and defend Pan Am's interests. Specifically, Attorney General Mattox has alleged as follows:

> The Preliminary Injunction permits the Plaintiffs to compete unfairly with their competitors because it frees them of the burden of complying with the Deceptive Trade Practices Act. Staying the injunction harms the Plaintiffs only insofar as it requires them to compete fairly with their competitors. As long as their competitors remain subject to a DTPA enforcement action, the Plaintiffs are not harmed by also being subject to such action pending appeal of this case.

Defendant's Motion to Stay or Modify the Preliminary Injunction Pending Appeal, at 2-3 (filed February 10, 1989) (emphasis added).

6. Because Pan Am (l) has an interest in adjudicating the constitutionality of the NAAG Guidelines and the attorney generals' present or threatened enforcement actions, which are the subject of this action, (2) is so situated that the disposition of this action may as a practical matter impair or impede its ability to protect that interest, and (3) is neither adequately represented nor its interests adequately protected by the existing parties, Pan Am seeks leave to intervene of right as a party plaintiff pursuant to Rule 24(a) of the Federal Rules of Civil Procedure.

7. Alternatively, because Pan Am has claims against Attorney General Mattox and also has defenses in the removed Texas state court action which constitute questions of law and fact in common with the questions of law and fact in this proceeding, Pan Am seeks leave for permissive intervention as a party plaintiff pursuant to Rule 24(b) of the Federal Rules of Civil Procedure.

8. Furthermore, Pan Am moves the Court to extend the protection of its preliminary injunction Order of January 30, 1989 to Pan Am, and its agents,

employees and representatives, and further moves the Court to enjoin defendant Mattox from his continued prosecution of the removed Texas state court action. In support of this Motion, Pan Am submits the attached memorandum of law, the Affidavit of John M. Bloodworth (Exhibit A), and a certified copy of Plaintiff's Original Petition in State of Texas v. Pan American World Airways, Inc. (Exhibit B).

[Signatures and certificate of service omitted in printing.]

[Title omitted in printing.]

AFFIDAVIT OF JOHN M. BLOODWORTH

BEFORE ME, the undersigned authority, personally appeared John M. Bloodworth, who being duly sworn, deposes and states as follows:

1. My name is John M. Bloodworth. I am over the age of 21 years, have never been convicted of a crime, and have personal knowledge of all the facts and opinions contained herein.

2. I have been employed by Pan American World Airways, Inc. (Pan Am) as Vice President of Advertising and Marketing since January 1989. Prior to that time, I was Managing Director of Advertising and Marketing for seven months. I commenced employment with Pan Am in March 1986 and have been involved in Pan Am's advertising since November 1986, when I became System Director of Advertising and Sales Promotion.

3. I am familiar with the regulatory framework within which major airlines operate in determining and publishing passenger air fares.

4. Pan Am establishes and advertises air fares for passengers on its commercial flights in accordance with federal law and guidelines, as articulated in the Federal Aviation Act and in the rules and regulations issued by the United States Department of Transportation (DOT) or its predecessor agency, the Civil Aeronautics Board (CAB). This, I believe, is

standard practice for most other domestic American airlines. To my knowledge, through 1987, such Federal laws, rules, and regulations provided the sole and exclusive legal authorities for determining what constituted fair, unfair, or deceptive practices in the advertising and pricing of commercial air fares. In August of 1987, the National Association of Attorney Generals (NAAG) first started to exert pressure on Pan Am and other airlines to make broad changes in their commercial air fare advertising.

5. In 1987 and 1988, Pan Am received copies of a proposed set of guidelines on advertising and marketing practices for air fares ("Guidelines") issued by NAAG. Following the adoption of such Guidelines over various airline industry objections, including Pan Am's, certain NAAG members threatened to file lawsuits for alleged violations of various state consumer protection laws, based on the members' interpretation of those Guidelines, in an attempt to control the advertising practices of commercial airlines.

6. Specifically, Stephen Gardner, Texas Assistant Attorney General, threatened Pan Am on behalf of Texas Attorney General Jim Mattox, a member of NAAG, that Mattox would sue Pan Am for deceptive advertisement of air fares. See the attached copy of Mr. Gardner's letter of November 14, 1988, addressed to me (Exhibit 1). In addition to issuing this threat on behalf of the Attorney General and the State of Texas, Mr. Gardner also purported to serve this "formal notice of intent to sue" on behalf of the States of

California, Massachusetts, New York and Washington (Id.)

7. On February 28, 1989, Mr. Gardner carried out this threat by commencing an action in the District Court of Dallas County, Texas, 101st Judicial District (Cause No. 89-2510E), seeking to restrain certain advertising by Pan Am in Texas, allegedly on the ground that such advertising is deceptive and in violation of Texas Business and Commercial Code Sections 17.41 et seq. Such enforcement action apparently has been taken as a continuation of the concerted efforts of certain NAAG members to implement and enforce their Guidelines through state law. The filing of this action also demonstrates that the threat by Mr. Mattox last November was also backed by an intent to actually follow through on the threat and file suit. Attorney General Mattox has taken this step despite his involvement in the present proceedings where similarly situated airlines sought to enjoin such enforcement actions, and despite this Court's preliminary injunction against the Attorney General's initiation of such actions.

8. By his threats and through the coercive act of filing suit against Pan Am, Attorney General Mattox is seeking to compel Pan Am, and other airlines similarly situated, to include in their published air fares and in their advertising the $3.00 international departure fee, the $10.00 customs and immigration fee, and the $10.00 security surcharge which Pan Am and other airlines currently impose on transatlantic air travel. While the first two fees are mandated by federal law (and are collected by all airlines in the transatlantic market), the

$10.00 security surcharge is levied only by certain U.S. flag carriers. The security surcharge has been assessed by Pan Am since 1986, in connection with the provision of security services against air piracy and terrorism in the transatlantic air travel market.

9. The actions of Mr. Mattox and the threatened acts by NAAG and/or certain of its other members portend that in the future, Pan Am and other airlines will have to comply not only with Federal law, but also with the laws of many or all 50 states, the U.S. territories and local enactments, in formulating their advertising of air fares. Such a disparate regulatory scheme would undoubtedly create confusion for the customer and inconsistency among each jurisdiction's regulatory requirements for airline advertising. Furthermore, Pan Am would be exposed to lawsuits not only in Texas, but in each other jurisdiction seeking to regulate advertising, even though that advertising meets the existing, uniform federal standards.

10. Pan Am regularly advertises its transatlantic and other rates, routes, and services, including advertisements in newspapers and other publications that circulate in Texas. These advertisements completely disclose the three transatlantic surcharges in the aggregate. The charges are usually described in this manner: "$23 U.S. departure tax, security surcharge and custom fees not included." A sample advertisement published in several Texas newspapers during the last three months of 1988 is attached hereto as Exhibit 2. The advertisement in the attached Exhibit 2 is in full compliance with all present

federal laws and regulations, including DOT rules, regulations and enforcement policies. The practice of advertising transatlantic surcharges separately from the total advertised air fare has been specifically approved by the DOT.

11. Adherence to the NAAG Guidelines with respect to the $23.00 in fees assessed by Pan Am upon transatlantic travellers poses several threats to both consumers and the airline industry. Pan Am's advertising in the broadcast media will necessarily contain less information than under the present federal regulatory scheme which the DOT has fostered, as only a limited amount of information can be effectively communicated in 30 or 60 second spots. It simply is not possible to make all the disclosures which the NAAG Guidelines require in such short time periods. The likely result of such compliance will be that advertisements either will contain no air fare information at all or that airlines, including Pan Am, will place fewer broadcast advertisements containing air fare information. If Pan Am and other airlines lose their ability to publicize fare reductions quickly and effectively through the broadcast media, which would be one result of full compliance with the NAAG Guidelines, the airlines will lose much of their incentive to cut fares. Moreover, the decrease in information available to the public will undoubtedly have a negative impact on the public's ability to gauge comparative prices and to gather meaningful information regarding air travel.

12. Compliance with the NAAG Guidelines will also provide a distinct competitive

advantage for foreign flag carriers. Pan Am already discloses in its advertisements the existence and amounts of fees and surcharges in full compliance with DOT rules and regulations. (See Exhibit 2.) If Pan Am is compelled to include the $10.00 security surcharge in its stated air fare, it will appear that Pan Am charges a higher air fare than its foreign counterparts, because the latter do not assess a security surcharge. This will compel Pan Am, and similarly situated airlines, to consider whether the imposition of a security surcharge places them at a competitive disadvantage with respect to foreign-flag carriers.

13. Compliance with advertising policies set forth in the NAAG Guidelines forces Pan Am to contend with the possibility of responding and adhering to inconsistent and conflicting federal and state regulatory schemes. Television advertising has already been complicated and adversely affected by the increased use of superimposed legends and mandatory audio disclosures which the NAAG Guidelines require. Newspaper advertisements can no longer incorporate a large number of prices for multiple destinations, because of space limitations. These developments have already created a significant disincentive against price competition. They have also engendered continuing problems for Pan Am, which must address inconsistent and overlapping state and federal enforcement policies.

14. Pan Am should not be required to regulate its national advertising to conform either to Texas' expectations or to those of any

other state, group of states, or local governments. This is particularly true where, as here, some states have refused to adopt the NAAG Guidelines (New Mexico), and others have chosen to adopt some (but not all) of such Guidelines as expressions of their state laws (such as North Dakota). Neither Pan Am nor other similarly situated carriers should be required to comply with, or face the possibility of complying with, many different state, territorial, and local regulatory schemes, in addition to the already comprehensive federal scheme.

15. As noted in the attached Exhibit 2, Pan Am's advertising on its face discloses the existence of an aggregate of $23.00 in transatlantic fees (which amount includes the $3.00 international departure tax, the $10.00 customs fee, and Pan Am's security surcharge of $10.00 on transatlantic flights). Thus, these advertisements disclose the total amount of the transatlantic surcharges and contain nothing that is deceptive or misleading to the citizens of the State of Texas.

16. Although we have attempted to estimate the impact on Pan Am's revenues and the number of passengers who would switch from Pan Am to other carriers if Pan Am is forced to comply with the NAAG Guidelines, we have found that it is impossible to do so. There is no way for us to determine how many people would book flights on foreign flag carriers in lieu of Pan Am because of the highlighted price difference occasioned by including the security surcharge in advertised prices. Nevertheless, there can be no question that there would be a loss of

customers and a resulting decrease in revenue even though we have no way at this time to quantify the dollar amount of such loss to Pan Am.

[Signature and jurat omitted in printing.]

[Letterhead of Texas Attorney General]

November 14, 1988

VIA FEDERAL EXPRESS

John Bloodworth
Director of Advertising and Sales Promotion
Pan American World Airways
200 Park Avenue
New York, NY 10166

Re: Disclosure of fare surcharges in advertisements

Dear Mr. Bloodworth:

I am writing on behalf of the States of California, Massachusetts, New York, Texas, and Washington to reaffirm the position of the states regarding fare surcharges in advertisements. It is the position of the states that any fuel, tax, or other surcharge to a fare must be included in the total advertised price of the fare. Failure to do so violates our respective state consumer protection laws.

Specific surcharges which must be included in the advertised fare are

- the $3.00 international departure fee,
- the $10.00 customs fee,
- the "security" surcharge (usually $10.00), and
- any fuel surcharge.

It is no defense to claim that the surcharges are disclosed elsewhere in the advertisement. The deception, and thus the violation of our laws, occurs when the advertisement states a specific amount for a fare which is not in fact the true cost because the surcharges have been factored out. This deception cannot be cured by a footnote or other separate reference.

The states do not wish to burden airlines unduly with respect to advertising their fares. Full disclosure in this instance is actually simpler – no footnote is required and there is therefore less "clutter" in the advertisement.

More importantly, our citizens – and your customers – will not be deceived by inaccurate information.

The states are aware that the United States Department of Transportation ("DOT") has taken the position that factoring out some surcharges is proper. In Orders 8-3-25 and 88-8-2, DOT has condemned fuel surcharges but has condoned the three international fare surcharges (departure, customs, and "security").

This position taken by DOT is contrary to its own existing regulation (14 CFR §399.84) which says, in relevant part:

> "[A]ny advertising or solicitation...for passenger air transportation...that states a price...[is] an unfair or deceptive practice, unless the price stated is the entire price to be paid by the customer...for such air transportation... ."

The states believe that DOT itself violated the law when it issued these orders. Accordingly, the states signing this letter, together with 22 other states, have sued DOT for its illegal actions. That case is now pending in the United States Court of Appeals for the District of Columbia Circuit in Washington, D.C. (Docket Nos. 88-1348 and 88-1682). It is scheduled for oral argument on January 23, 1989.

The states are also aware that certain members of the industry have voiced the opinion that state enforcement of our consumer protection laws has been preempted by the DOT. The states disagree. Regardless of whether DOT is willing to allow deceptive advertising, the states are not. Our analysis of the law of preemption in this area convinces us that the states are free to protect our citizens from deception by enforcing our state consumer protection laws. We believe that this position fully comports with the Administration's own policy on preemption as expressed in Executive Order 12612, issued on October 26, 1987.

We are, however, aware that the apparent attempt by DOT to contravene the law by allowing surcharges has possibly created an atmosphere of confusion in the industry. Airlines may believe that they only need to comply with the DOT position.

This is not the case. Airlines may comply with the laws of the states without conflicting with DOT policy, and accordingly they must do so. This letter has been sent to every airline which we have identified as deceiving the public through surcharge advertising. This is the final opportunity to cure your violation of the state laws.

This letter serves as formal notice of intent to sue as required by our respective state laws. If your airline deceptively advertises fares in the future, you will be subject to being sued without further notice or opportunity to cure.

To allow time to bring your advertising into compliance, we will not take action until after November 30. Any advertisement which appears prior to December 1 will not be the subject of legal action by the states signing this letter, *unless* a deceptive advertisement appears on or after December 1.

If you have any questions regarding the position stated in this letter, we encourage you to contact us for further discussions.

It is our desire that, having made our position clear, we may expect cooperation from all airlines in preventing future deception.

Very truly yours,

/s/STEPHEN GARDNER
Assistant Attorney General

NO. 89-2510

STATE OF TEXAS	§	IN THE DISTRICT
	§	COURTS OF
Plaintiff,	§	
	§	
V.	§	DALLAS COUNTY,
	§	TEXAS
	§	
PAN AMERICAN WORLD AIRWAYS, INC.,	§	
	§	
	§	101ST JUDICIAL
Defendant	§	DISTRICT

PLAINTIFF'S ORIGINAL PETITION

TO THE HONORABLE JUDGE OF THE COURT:

The State of Texas, Plaintiff, acting by and through Attorney General Jim Mattox, complains of Pan American World Airways, Inc., ("Pan Am") Defendant, and for cause of action would respectfully show the Court the following:

Jurisdiction

1. This action is brought by Attorney General Jim Mattox, through his Consumer Protection Division, in the name of the State of Texas and in the public interest under the authority granted to him by Section 17.47 of the Texas Deceptive Trade Practices-Consumer Protection Act, TEX. BUS. & COM. CODE ANN. §17.41 *et seq.* ("DTPA") upon the grounds that Pan Am has engaged in false, misleading and deceptive acts and practices in the conduct of trade

and commerce as defined and declared unlawful by DTPA §17.46.

Defendant

2. Pan Am is a corporation incorporated under the laws of the state of New York. Defendant may be served with process by serving its registered agent for service of process, C.T. Corporation System, 811 Dallas Avenue, Houston, Texas 77002.

Venue

3. Venue of this cause of action lies in Dallas County, as provided by and based upon Civil Practices and Remedies Code §15.036 and DTPA §17.47(b) on the following grounds:

a. The cause of action or a part thereof accrued in Dallas County, Texas in that Pan Am has engaged in false, misleading and deceptive acts and practices in trade and commerce in Dallas County, Texas, as set forth in paragraphs 9-29.

b. Pan Am's advertising activities, as set forth in paragraphs 9-29, have occurred in Dallas County, Texas.

c. Pan Am has done business in Dallas County, Texas, as set forth in paragraphs 9-29.

Public Interest

4. By reason of the institution and operation of the unlawful practices set forth herein, Pan Am has caused irreparable injury, loss, and

damage to the State of Texas, and will also cause adverse effects to legitimate business enterprise which conducts its trade and commerce in a lawful manner in this state. Therefore, the Consumer Protection Division believes and is of the opinion that these proceedings are in the public interest.

Notice Before Suit

5. At least seven days before instituting this cause, the Consumer Protection Division informed Pan Am herein in general of the alleged unlawful conduct of which complaint is now made, pursuant to §17.47(a) of the DTPA.

Trade and Commerce

6. At all material times herein, Pan Am has engaged in conduct, as more fully set forth herein, which constitutes "trade" and "commerce" as those terms are defined by DTPA §17.45(6).

Acts of Agents

7. Whenever in this petition it is alleged that Pan Am did any act, it is meant that Pan Am performed or participated in such act or that such act was performed by the agents or employees of Pan Am and in each instance, the agents or employees of Pan Am were then authorized to and did in fact act on behalf of Pan Am.

Nature of Defendant's Deceptive Practices

8. Pan Am is a commercial air carrier which operates scheduled flights into and out of Texas for both domestic and international destinations.

9. As part of its operations, Pan Am advertises its services in Texas.

10. Frequently, Pan Am advertises heavily-restricted low fares.

11. A major purpose for advertising these fares at a very low price is to attract passengers who would otherwise choose another carrier.

12. Air carriers frequently compete on the basis of low air fares, alone and apart from amenities such as meals.

13. In fact, the competition for passengers often becomes so intense that carriers engage in fare wars, striving to match or beat the competitors' fares, if only by a few dollars.

14. At the current time, international air travel is in a slump, due in part to the in-air terrorist bombing of a Pan Am flight in Europe, and consumers' understandable fear of air travel to destinations such as Europe.

15. When travel is down, the time is particularly ripe for fare wars, or other forms of fare price competition.

16. In order that competition between Pan Am and other air carriers work properly, the fare information to consumers must accurately reflect the true cost of flying. Unfortunately, recent actions by Pan Am have prevented full and open competition.

17. Beginning on or about February 23, 1989, Pan Am caused advertisements to be placed in major newspapers in Texas, which prominently displayed an air fare of $149 to Europe, the Caribbean, Central

America, and Venezuela in numbers nearly three inches high. A copy of such advertisement from the *Dallas Times Herald* dated February 23, 1989 is attached as Exhibit A. (The Exhibit is reduced in size from the original, which is approximately 18 inches high by 11 inches wide.)

18. Although three-inch-high letters proclaim the $149 fare, Pan Am discloses in one-quarter-inch-high type that this is based on a $298 round-trip purchase.

19. Further down the page, in extremely confusing language, Pan Am goes on to state the "catch" -- a prior $160 minimum ticket purchase and trip between February 21, two days before the ad appeared, and March 3, eight days after the ad appeared.

20. Even a passenger who manages to make the immediate decision to travel within the week will discover that the actual fare is more than $298.

21. For all European destinations, Pan Am adds to the $298 a total of $23 in additional charges, consisting of:

- $3 departure tax,
- $10 customs and immigration fees, and
- $10 "security surcharge."

This "disclosure" is made in one-eighth-inch-high type (24 times smaller that the $298 price advertised).

22. The $3 departure tax is required by federal law to be included in the full fare.

23. The $10 customs and immigrations fees are required by federal regulation to be included in the full fare.

24. The $10 security surcharge is totally fictitious. It is neither a tax, nor a fee, nor any other form of governmental impost. It is, in truth, merely an additional revenue source for Pan Am.

25. By deleting these $23 in surcharges from the advertised fare, Pan Am has artificially and deceptively lowered its apparent fare from $321 -- the true cost -- to $298. This is a false "discount" of more than 7%.

26. This is classic bait-and-switch advertising. Pan Am baits the consumer with one price -- $298 -- but then switches to another when the consumer takes the bait and telephones or comes to an agent to buy a ticket.

Deceptive Trade Practices

27. Pan Am, in the course and conduct of trade and commerce, has engaged in false, misleading and deceptive acts and practices in violation of DTPA §§17.46 (a) and (b), including but not limited to the following:

a. Failing to include any fuel, tax, or other surcharge to a fare for air travel in the total advertised price of the fare;

b. Engaging in bait and switch advertising;

c. Representing that its goods and services have characteristics that they do not have;

d. Advertising goods and services with the intent not to sell them as advertised;

e. Making false and misleading statements of fact concerning the amount of price reductions; and

f. Failing to disclose information concerning Pan Am's goods and services which is known to Pan Am and which Pan Am fails to disclose with the intent to induce consumers to enter into transactions with Pan Am into which they would not have entered had Pan Am not disclosed the information.

Injury to Consumers

28. By means of the foregoing unlawful acts and practices, which were producing causes of injury to the persons affected, Pan Am has acquired money or other property from identifiable persons to whom such money or other property should be restored, or who in the alternative are entitled to an award of damages.

29. By reason of the institution and continued operation of the acts and practices described hereinabove, Pan Am has violated and will continue to violate the laws herein alleged. Pan Am, unless restrained by this Honorable Court, will continue violations of the laws of the State of Texas and immediate and irreparable injury, loss and damage will result to the State of Texas and to the general public.

Prayer

WHEREFORE, PREMISES CONSIDERED, Plaintiff prays that Pan Am be cited according to law to appear and answer herein, that a temporary restraining order be issued immediately without notice, that after due notice and hearing a Temporary Injunction be issued against Pan Am, and upon final hearing, a Permanent Injunction be issued enjoining Pan Am, its associates, officers, agents, servants, employees, and attorneys and those other persons in active concert or participation with Pan Am who receive actual notice of this injunction by personal service or otherwise, from engaging in the following acts or practices:

1. Failing to include any fuel, tax, or other surcharge to a fare for air travel in the total advertised price of the fare.

2. Engaging in bait and switch advertising;

3. Representing that its goods and services have characteristics that they do not have;

4. Advertising goods and services with the intent not to sell them as advertised;

5. Making false and misleading statements of fact concerning the amount of price reductions; and

6. Failing to disclose information concerning Pan Am's goods and services which is known to Pan Am and which Pan Am fails to disclose with the intent to induce consumers to enter into transactions with Pan Am into which they

would not have entered had Pan Am not disclosed the information.

Plaintiff further prays that upon final hearing this Court order Pan Am to compensate identifiable persons for actual damages or restitution of money which was acquired by Pan Am by means of the unlawful acts and practices cited herein.

Plaintiff prays that Pan Am be ordered to pay civil penalties in the maximum amount authorized by the DTPA, as well as court costs and attorneys fees pursuant to Section 402.006(c) of the Texas Government Code. Plaintiff further prays that this Court grant such other relief as the Plaintiff may show itself to be entitled.

Dated February 28, 1989
[Signatures and clerk's certificate omitted in printing.]

London Roundtrip +Hotel+Car=

$298

It's the kind of deal that makes you want to run for the phone. Actually, it's three deals in one.

Unbelievably low fares to London, or elsewhere in Europe.

Imagine $298* roundtrip to London. Or a fare just as surprising to many other popular TWA destinations in Europe.

Just fly over between October 16 and December 7, any day Sunday through Wednesday, and return any Monday through Thursday by December 15, 1988. If you buy your ticket before October 1, there is no advance purchase, just purchase your ticket within 48 hours of reservation. But please plan carefully – this incredibly low fare is nonrefundable.

Stay 3 paid nights in a great hotel and the next 3 are free.

Stay three consecutive nights in any of nine exclusive London Trusthouse Forte Hotels, and the next three nights, out in the lovely English countryside, are on us.** The offer is good at any of over 200 charming Trusthouse Forte Hotels throughout Great Britain.

Just make your advance hotel reservation and stay from October 1, 1988 through March 31, 1989. For more information, call Trusthouse Forte Hotels directly at 1-800-225-5843 and ask about TWA's "Countryside Special."

Drive an Alamo rental car, 3 days free.

Starting from the day you arrive in London, you'll get three days' free use of an Alamo economy car with unlimited mileage.* If you want to keep it longer, the rate is only $17 a day.

All you do is reserve the car in advance, directly with Alamo, and show your TWA ticket when you arrive. For more information, call Alamo at 1-800-732-3232 and ask about TWA's "London Special."

So if you've been thinking about London lately – or even if you haven't – call your travel agent, or TWA in New York at 212-290-2141 or 516-222-9212, New Jersey, 201-643-3339, or elsewhere at 1-800-892-4141.

TODAY'S TWA.
FIND OUT HOW GOOD WE REALLY ARE.™

TWA

BEST AVAILABLE COPY

[Text of advertisement on preceding page.]

London Roundtrip
+ Hotel + Car =
$298

It's the kind of deal that makes you want to run for the phone. Actually, it's three deals in one:

Unbelievably low fares to London, or elsewhere in Europe.

Imagine $298* roundtrip to London. Or a fare just as surprising to many other popular TWA destinations in Europe.

Just fly over between October 16 and December 7, any day Sunday through Wednesday, and return any Monday through Thursday by December 15, 1988. If you buy your ticket before October 1, there is no advance purchase, just purchase your ticket within 48 hours of reservation. But please plan carefully – this incredibly low fare is nonrefundable.

Stay 3 paid nights in a great hotel and the next 3 are free.

Stay three consecutive nights in any of nine exclusive London Trusthouse Forte Hotels, and the next three nights, out in the lovely English countryside, are on us.** The offer is good at any of over 200 charming Trusthouse Forte Hotels throughout Great Britain.

Just make your advance hotel reservation and stay from October 1, 1988, through March 31, 1989. For more information, call Trusthouse Forte Hotels directly at 1-800-225-5843, and ask about TWA's "Countryside Special."

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All you do is reserve the car in advance, directly with Alamo and show your TWA ticket when you arrive. For more information, call Alamo at 1-800-732-3232 and ask about TWA's "London Special."

So if you've been thinking about London lately – or even if you haven't – call your travel agent, or TWA in New York at 212-290-2141 or 516-222-9212; New Jersey, 201-643-3339, or elsewhere at 1-800-892-4141.

TODAY'S TWA.
FIND OUT HOW GOOD WE REALLY ARE.

TWA

*Fare conditions: VLXNR Minimum stay 7 days maximum stay 21 days U. S. departure tax, security surcharge and customs fee totaling $23 not included. Fare is nonrefundable, subject to change, and government approval. 45 day advance purchase within 48 hrs of reservation applies to tickets purchased from 10/1-10/23/88. Seats are limited. **London (Countryside Special) Hotel Offer: Hotel rooms are subject to availability, and passengers must originate in U.S. Offer is not combinable with any other Trusthouse Forte promotional or seasonal weekend rates. Alamo Car Offer: Fuel surcharges,

taxes, optional items not included. Standard Alamo driver qualifications apply. Subject to availability. Automative transmission model are available for a slightly higher rate. Offer is not valid 12/16-12/31/88.

[Other non-text material omitted in printing.]

[Title omitted in printing.]

ORDER

Came on this date to be considered the Motion of Pan American World Airways, Inc. ("Pan Am") for Leave to Intervene in the above-styled cause. The action pending against Pan Am in the United States District Court for the Northern District of Texas, Dallas Division, has been transferred to this Court and consolidated with the present action. The Court, therefore, has determineed that the Motion to Intervene should be granted pursuant to Rule 24(b)(2), and that the protective order issued by this Court be broadened to include Pan Am.

IT IS SO ORDERED.

SIGNED this 26th day of May, 1989.

/s/WALTER S. SMITH, JR.
UNITED STATES DISTRICT JUDGE

[Title omitted in printing.]

STATE OF CALIFORNIA)
) ss.
COUNTY OF SAN DIEGO)

HERSCHEL T. ELKINS, being duly sworn, hereby deposes and says:

1. My name is Herschel T. Elkins. I am a citizen of the United States and a resident of the State of California. I live and work in Los Angeles, California. I am over 18 years of age.

2. I am Senior Assistant Attorney General of the State of California and I head the Consumer Law Section which files court actions on behalf of Attorney General John K. Van de Kamp in regard to violations of California's false advertising and deceptive and unfair business practices statutes. In his capacity as attorney general, Attorney General John K. Van de Kamp has been named as a defendant in the amended complaint in the captioned case (hereinafter, the "Amended Complaint").

3. I make this affidavit for the purpose of attacking the truthfulness of certain material, factual allegations contained in the amended complaint with respect to subject matter jurisdiction and personal jurisdiction insofar as such allegations are or purport to be addressed to Attorney General John K. Van de Kamp or the State of California. I understand and intend that this affidavit will be filed in support of a motion or motions to dismiss the amended complaint for lack of subject matter jurisdiction and lack of personal jurisdiction

pursuant to Rule 12(b)(1), Rule 12(b)(2), and Rule 12(b)(6) Federal Rules of Civil Procedure.

4. As the chief law enforcement officer of the State of California, Attorney General John K. Van de Kamp enforces the laws of this State. The amended complaint alleges, in relevant part, paragraphs 7 and 37, "The threatened enforcement of these (NAAG) Guidelines by (Defendant Texas) Attorney General Mattox, issuing out of this district (W.D. Texas) on behalf of himself and other attorneys general in concert, gives rise to this complaint." Contrary to this allegation, Attorney General John K. Van de Kamp has not threatened nor could he threaten to enforce the NAAG Guidelines on airline advertising. These guidelines are not laws and do not pretend to have the force and effect of law. If an airline engages in false advertising in this State and a lawsuit is filed by our offices, it would be filed pursuant to California's false advertising statutes (Business and Professions Codes sections 17535 and 17536) and California's unfair business practices statutes (Business and Professions Codes sections 17204 and 17206). Therefore the factual allegations in paragraphs 7, 37, 38, 60, 68, 73, 77 and 80 do not apply to the State of California.

5. The amended complaint further alleges "Attorney General Mattox . . . has acted as agent for the other defendants in spearheading the creation, implementation and enforcement of the NAAG Guidelines by its various members." Attorney General Mattox has not been authorized to act as Attorney General John K. Van de Kamp's agent nor as agent for the State of California, and to the best of my knowledge has not acted as Attorney General John K. Van de Kamp's agent nor as agent for the

State of California in any alleged enforcement of the NAAG Guidelines or otherwise. While the State of California has worked cooperatively with the State of Texas and other states to tackle the problem of deceptive airline advertising, representatives from our office have always acted independently of Texas and other states in these cooperative efforts, and have sought only to protect the interests of California consumers and to enforce California law.

6. Despite numerous references in the amended complaint to "State Attorneys General . . ." acting "in concert with other attorneys general . . .", "to implement or enforce the guidelines", neither California nor Attorney General John K. Van de Kamp acts in concert with any other state to enforce guidelines or state law. As Attorney General of the State of California, Attorney General John K. Van de Kamp acts independently to enforce the laws of this State. Attorney General John K. Van de Kamp does not have the authority to enforce the laws of any other state. Contrary to plaintiffs' implications in their amended complaint, neither NAAG nor any other state attorney general ever makes a determination for California or for Attorney General John K. Van de Kamp as to when California should or will take enforcement action. Nor would California nor Attorney General John K. Van de Kamp ever presume to dictate to other sovereign sister states when or if they should take enforcement action. Therefore the factual allegations in paragraphs 7, 37, 50, 72 and 77 do not apply to the State of California.

7. Attorney General John K. Van de Kamp does not do business in Texas nor have the authority to enforce Texas law.

8. Neither California nor Attorney General John K. Van de Kamp consents to this Court's jurisdiction over his person.

[Signature and jurat omitted in printing.]

Supreme Court, U.S.
FILED
JAN 13 1992
OFFICE OF THE CLERK

No. 90-1604

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

DAN MORALES,
ATTORNEY GENERAL OF TEXAS,
Petitioner,
v.

TRANS WORLD AIRLINES, INC., *et al.*,
Respondents

BRIEF OF PETITIONER

Of Counsel:
DAN MORALES
Attorney General of Texas
WILL PRYOR
First Assistant Attorney General
MARY F. KELLER
Deputy Attorney General

Counsel of Record:
STEPHEN GARDNER
Assistant Attorney General
Office of the Attorney General
714 Jackson St., Ste. 700
Dallas, Texas 75202
214/742-9698

January 1992

QUESTION PRESENTED

Can airlines falsely advertise air fares in Texas, in total disregard of state law prohibitions, merely because the federal government has pre-emptive regulatory authority over an airline's "rates, routes, or services" under the Federal Aviation Act?

LIST OF PARTIES

This petition is filed by Texas Attorney General Dan Morales.[1] In addition to Texas, 33 state attorneys general are parties to this proceeding, having been defendants in the proceedings below.[2]

The plaintiffs/appellees below were Trans World Airlines, Inc.; Continental Airlines, Inc.; British Airways PLC; Air Canada; Compagnie Nationale Air France; Alitalia-Linee Aeree Italiane, S.p.A.; El Al Israel Airlines Ltd.; Finnair; Lufthansa German Airlines; Japan Air Lines Company, Ltd.; Qantas Airways Ltd.; Scandinavian Airlines System; Viacao Aerea Rio-Grandense (VARIG); and Pan American World Airways, Inc.[3]

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1 Petitioner will be referred to herein as "the State" or "Texas."

2 These are the Attorneys General of the States of Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Florida, Idaho, Illinois, Iowa, Kansas, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, Nevada, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Rhode Island, South Dakota, Tennessee, Vermont, Washington, West Virginia, Wisconsin and Wyoming. A petition for a writ of certiorari filed by 31 of these state attorneys general (all but the attorneys general of Arkansas and Maine) is pending before the Court. *Attorney General of California v. Trans World Airlines, Inc.*, No. 90-1606.

3 These 14 respondents will be jointly referred to as "airlines" or "respondents."

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No. 90-1604

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

DAN MORALES,
ATTORNEY GENERAL OF TEXAS,
Petitioner,
v.

TRANS WORLD AIRLINES, INC., *et al..,*
Respondents

BRIEF OF PETITIONER

OPINIONS BELOW

The January 18, 1991, opinion of the United States Court of Appeals for the Fifth Circuit is published at 924 F.2d 1055 (5th Cir. 1991) and is reprinted at App. to Cert. Pet. 1a.

This case has been the subject of a prior appeal from the district court's issuance of a preliminary injunction, which the court of appeals affirmed on April 3, 1990, in an opinion published at 897 F.2d 773 (5th Cir. 1990); App. to Cert. Pet. 13a. On October 15, 1990, the Court denied Texas' petition for writ of certiorari to review the preliminary injunction, Justice Blackmun noting that he would dismiss the petition as moot. 111 S.Ct. 308 (1990).

On remand, the district court entered a permanent injunction and final judgment on June 1, 1990, which is reprinted at App. to Cert. Pet. 8a and which is virtually identical to the preliminary injunction that the court of appeals affirmed in its prior order. On January 18, 1991, the court of appeals affirmed the permanent injunction, based on its prior opinion with respect to the merits of the preliminary injunction. App. to Cert. Pet. at 1a. On November 27, 1991, the Court granted the petition for a writ of certiorari.

JURISDICTION

A petition for a writ of certiorari was timely filed on April 16, 1991. The Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Federal Aviation Act § 105(a)(1), 49 U.S.C. § 1305(a)(1) [in pertinent part]. Federal preemption.

[N]o State or political subdivision thereof and no interstate agency or other political agency of two or more States shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier having authority under subchapter IV of this chapter to provide air transportation.

Federal Aviation Act § 411(a), 49 U.S.C. § 1381(a). Methods of competition.

The Board may, upon its own initiative or upon complaint by any air carrier, foreign air carrier, or ticket agent, if it considers that such action by it would be in the interest of the public, investigate and determine whether any air carrier, foreign air carrier, or ticket agent has been or is engaged in unfair or deceptive practices or unfair methods of competition in air transportation or the sale thereof. If the Board shall find, after notice and hearing, that such air carrier, foreign air carrier, or ticket agent is engaged in such unfair or deceptive practices or unfair methods of competition, it shall order such air carrier, foreign air carrier, or ticket agent to cease and desist from such practices or methods of competition.

Federal Aviation Act § 1106, 49 U.S.C. § 1506. Remedies not exclusive.

Nothing contained in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies.

Texas Deceptive Trade Practices—Consumer Protection Act, TEX. BUS. & COM. CODE § 17.46(a) [in pertinent part].

False, misleading, or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful and are subject to action by the consumer protection division [of the Texas Attorney General] . . ..

Texas Deceptive Trade Practices—Consumer Protection Act, TEX. BUS. & COM. CODE § 17.46(b) [in pertinent part].

[T]he term "false, misleading, or deceptive acts or practices" includes, but is not limited to, the following acts:

* * *

(9) advertising goods or services with intent not to sell them as advertised;

* * *

(11) making false or misleading statements of fact concerning the reasons for, existence of, or amount of price reductions;

* * *

STATEMENT OF THE CASE

This is a suit brought by a number of airlines to prevent state attorneys general from fulfilling their statutorily-imposed mandate to protect their citizens from deceptive advertising. It arises from the efforts of the Attorney General of Texas and the attorneys general of other states to enforce their state false advertising laws.

1. Facts of the case.

In late 1988, the Attorney General of Texas, on behalf of Texas and four other states (California, Massachusetts, New York, and Washington), wrote letters to respondents Trans World Airlines, Inc. ("TWA"); Continental Airlines, Inc. ("Continental"); British Airways PLC ("British Airways"); Pan American World Airways, Inc. ("Pan Am"); and Lufthansa German Airlines ("Lufthansa"), advising them that their advertisements for low fare tickets were deceptive and violated the laws of the five states, as well as federal law. *See, e.g.*, J.A. at 56a.

These letters did not represent the first contact between the airlines and the State of Texas. For example, in 1987, the Texas Attorney General wrote to several airlines, including TWA and Continental, asking that they cease excluding a fuel surcharge from their advertised fares. *See, e.g.*, J.A. at 118a.

Even prior to those letters, Texas and other states had put the airlines on notice as to what were considered deceptive advertising practices, through adoption of guidelines on air fare advertising by the National Association of Attorneys General ("NAAG"). The Attorney General of Texas and the attorneys general of a number of other states served

on a task force that met with the airlines and other interested parties. The result of these meetings was the REPORT AND RECOMMENDATIONS OF THE NAAG TASK FORCE ON THE AIR TRAVEL INDUSTRY, 53 Antitrust & Trade Reg. Rep (BNA) No. 1345, Special Supplement (December 17, 1987) ("NAAG REPORT"). The main portion of the NAAG REPORT was devoted to Guidelines and Commentary relating to air fare advertising.[4]

The Guidelines and Commentary were explicitly not intended to be new law or regulation, but "merely explain in detail how existing state laws apply to air fare advertising . . .." U.S. Brief App. 11a. In adopting them, NAAG was clear that they were general enforcement policies only, and were subject to individual prosecutorial discretion and variations in individual state and common law. U.S. Brief App. 7a.[5]

Rather than avail themselves of the repeated opportunities to avoid litigation by advertising hon-

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4 The Guidelines and Commentary from the NAAG REPORT are attached to the Brief of the United States, at Appendix 9a-41a ("U.S. Brief App.").

5 An excellent summary of the development of the NAAG Guidelines can be found in *New York ex rel. Abrams v. Trans World Airlines, Inc.*, 728 F.Supp. 162, 168 (S.D.N.Y. 1990). It must be stressed that the Guidelines are no more than that—guidelines that were intended to put the airlines on notice as to what practices violated state law, so that they could bring themselves into conformity with state law and thus avoid needless litigation. NAAG REPORT at S-2.

estly, in compliance with both state and federal law, the respondent airlines chose to initiate this litigation.

2. History of the litigation. On January 23, 1989, TWA, Continental, and British Airways commenced this action in the United States District Court for the Western District of Texas, Austin Division, in which the Texas Attorney General was the only named defendant. This action sought both preliminary and permanent relief prohibiting the Texas Attorney General and unspecified others from enforcing the Texas Deceptive Trade Practices Act, or any other (also unspecified) state law, against airline advertising, an injunction that would effectively insulate these airlines from prosecution by the State of Texas for false or deceptive advertising.

On January 30, 1989, the district court granted the airlines a preliminary injunction that enjoined the Texas Attorney General and all other persons acting in concert or participation with him, *and* "all other persons having actual knowledge of" the injunction, from:

> [I]nitiating any enforcement action pursuant to Tex. Bus. & Comm. Code §§17.41 et seq. or any other provision of state law, which would seek *to regulate or restrict any aspect of the individually named plaintiff airlines' air fare advertising* or the [*sic*] operations involving their rates, routes and/or services.

App. to Cert. Pet. 50a [emphasis added].

On April 26, 1989, the district court permitted 10 additional airlines to intervene and expanded the preliminary injunction to include 33 more attorneys general within its scope. App. to Cert. Pet. 52a. In ef-

fect, this order applied to all state attorneys general who had expressed a desire to enforce their state laws, even though most of them had taken no enforcement action whatsoever at the time the suit was filed or when the injunction was expanded to cover them.

On appeal, the court of appeals affirmed every action of the district court, holding that the district court's sweeping preliminary injunction was proper because "§1305(a)(1) expressly preempts state deceptive advertising laws as applied to airline fare advertising." App. to Cert. Pet. 34a.[6]

The preliminary injunction was converted by the district court into a permanent injunction, on June 1, 1990. App. to Cert. Pet. 8a. The relevant provisions of the permanent injunction, and the basis therefor (federal pre-emption of state consumer protection laws), are the same as those in the preliminary injunction.

On January 18, 1991, the Fifth Circuit affirmed the issuance of the permanent injunction, based on its determination that its prior opinion on the merits of the preliminary injunction was the law of the case. App. to Cert. Pet. 1a. The Court granted this petition for certiorari on November 27, 1991.

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6 The Court denied Texas' initial petition for writ of certiorari with respect to the Fifth Circuit's opinion upholding the preliminary injunction, on October 15, 1990, Justice Blackmun noting that he would have dismissed the petition as moot. 111 S.Ct. 308 (1990).

SUMMARY OF ARGUMENT

Introduction. This case again raises the question of the continued vitality of our federalist system of government—the interplay between national authority and the rights of the states to enact and enforce their own laws. There is significant confusion in lower federal and state courts as to the meaning of the pre-emption clause of the Federal Aviation Act ("FAA"), 49 U.S.C. § 1305(a)(1). The State of Texas, unsurprisingly, urges the Court to rule that it is free to enforce its consumer protection laws[7] to stop deceptive advertising by airlines. The airlines that chose to bring this action, equally unsurprisingly, want the Court to rule that they are free to operate without having to bother with complying with these state laws. The Court must now determine which of these two irreconcilable viewpoints best meets the demands of public policy, both as expressed by Congress in the FAA and as established by the policies of federalism, through the Constitution and the prior decisions of the Court.

1. Application of state consumer protection laws to airlines fosters competition. The Texas law at issue is the Texas Deceptive Trade Practices–Consumer Protection Act, TEX. BUS. & COM. CODE §§ 17.41 *et seq.*. That consumer protection law, just as the other

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7 The specific Texas law at issue is the Deceptive Trade Practices–Consumer Protection Act, TEX. BUS. & COM. CODE § 17.41 *et seq.*. In brief, the Texas law prohibits all false, misleading, and deceptive acts and practices in the conduct of trade and commerce. It is similar in effect to laws in other states. For a good overview of the various state laws, *see* D. PRIDGEN, CONSUMER PROTECTION AND THE LAW § 3.01 *et seq.*. For clarity, all such state laws will be referred to herein as "consumer protection" laws.

state consumer protection laws invalidated by the courts below, is one of general applicability to all commercial practices, and does not have any special connection or reference to airline rates, routes, or services, or to any other airline practice. The law serves to keep competition honest and functioning properly.

2. Congress intended only limited deregulation of airline practices through the FAA. The Airline Deregulation Act of 1978, PUB. L. NO. 95-504, §4, 92 STAT. 1705 (1978), removed many of the anti-competitive economic regulations that had been installed to nurture the early development of the air travel industry. Congress intended to take the federal government out of the business of the economic, utility-like regulation of the rates, routes, and services of carriers providing air transportation and, at the same time, intended to see that states did not merely step in, and by re-regulating, undo what Congress had just done. However, Congress did not choose to take the federal government out of the role in regulating deceptive practices by airlines, a role it had long shared with the states.

3. Legislative history of the enactment of the pre-emption clause confirms that Congress did not intend to pre-empt state consumer protection laws. Examination of the legislative history of the Airline Deregulation Act of 1978 confirms that all Congress intended, when it adopted the limited pre-emption section of the Act, was to prevent the states from nullifying Congress' intent to permit free market competition within the air travel industry.

4. Texas law and federal law relating to deceptive airline practices are complementary and square with the principles of federalism. The effect of the Texas law is the same as that of the FAA's anti-deception standard, and is on all fours with existing federal regulation. Congress never intended to preempt all state consumer protection efforts relating to airlines. *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290 (1976).

5. Except for this case, court interpretations of FAA pre-emption of state regulation of deceptive airline practices are consistent in opposing pre-emption. This case is the only case in the federal or state courts that has found broad pre-emption of a state's enforcement of its consumer protection laws with respect to deceptive practices by airlines.

6. ERISA is not a proper analogue. The courts below applied a near-ritualistic use of similar language in the Employee Retirement Income Security Act of 1974 ("ERISA") to divine the intent of Congress in the FAA. However, ERISA is a statute whose pre-emptive effect is virtually unique and which serves poorly as a template for construing the FAA.

ARGUMENT

1. Application of state consumer protection laws to airlines fosters competition.

State regulation of air fare advertising plays an essential role in ensuring efficient functioning of the marketplace. It makes the marketplace function better by making it function honestly. This benefits the consumer, who gets the information needed to make a proper purchasing decision, and it rewards the honest airline, which does not lose sales to the dishonest one.

The state laws at issue are general consumer protection laws enacted by state legislatures to prevent deceptive and misleading commercial practices directed at their citizens. None of them are directed at airline practices in particular. For example, the Texas consumer protection law provides:

> False, misleading, or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful . . . . [T]he term "false, misleading, or deceptive acts or practices" includes, but is not limited to . . . advertising goods or services with intent not to sell them as advertised . . . [or] making false or misleading statements of fact concerning the reasons for, existence of, or amount of price reductions . . . .

TEX. BUS. & COM. CODE §§ 17.46(a), 17.46(b)(9), and 17.46(b)(11).

This law applies to used car dealers, pyramid schemers, and snake oil sellers. It also applies to other forms of travel with which the airlines directly compete–trains, buses, rental cars–and to others in the travel industry–travel agents, hotels, motels. The law has no connection with or reference to airlines and functions irrespective of the existence of the FAA and the presence or absence of federal regulation. *See, e.g., Ingersoll-Rand Co. v. McClendon*, 111 S.Ct. 478, 483 (1990).

Public policy weighs heavily in favor of the continued ability of the State to regulate deceptive advertising aimed at its citizens. If the logic of the courts below is extended, it pre-empts all state laws that can be argued to "relate to" airline operations—and not just directly to rates, routes, and services—and the effect of this would be absurd. State laws that prohibit

gambling, prostitution, or the sale of illegal drugs could be avoided merely by the inception of those activities by an airline. This is not what Congress intended. Nor is the less-severe but nonetheless significant grant of immunity from state consumer protection laws given the airlines by the courts below.

2. Congress intended only limited deregulation of airline practices through the FAA.

The genesis of the limited pre-emption of state regulation of airline practices was the enactment of the Airline Deregulation Act of 1978, Pub. L. No. 95-504, §4, 92 STAT. 1705 (1978), which removed many of the anti-competitive economic regulations that had been installed to nurture the early development of the air travel industry.

The primary features of deregulation were the liberalization of restrictions on entry into the industry and significant reductions in the federal government's authority to regulate rates, routes, and services of air transportation. *See generally*, Freeman, *State Regulation of Airlines and the Airline Deregulation Act of 1978*, 44 J. AIR L. & COM. 747, 754 (1979).[8] The primary motivation for eliminating such direct economic regulation of the industry was the belief that the air travel industry could more effectively be governed by market forces than by the federal government. *Id.*

The Airline Deregulation Act amended the FAA in many ways designed to effect Congress's intent to limit direct economic regulation of the air travel industry. Of specific relevance to this case are two sec-

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8 Mr. Freeman was a Senior Attorney in the Office of the General Counsel of the CAB at the time he wrote this article.

tions, the pre-emption clause and the saving clause, which must be read together.

> [N]o State or political subdivision thereof and no interstate agency or other political agency of two or more States shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier having authority under subchapter IV of this chapter to provide air transportation.

49 U.S.C. § 1305(a)(1) [in pertinent part].

> Nothing contained in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies.

49 U.S.C. § 1506.

It is clear that Congress intended to deregulate all federal and state economic regulation that it viewed as anti-competitive. Congress's purpose was to encourage competition among the airlines by taking the federal government out of the business of utility-type economic regulation of air transportation (setting rates, routes, and services). Prior to 1978, the federal government had strictly dictated the rates, routes, and services an airline could offer. By terminating this control, Congress hoped to encourage competition among airlines and bring ticket prices down. 49 U.S.C. § 1302(a)(3) and 1302(a)(4); Act of Oct. 24, 1978, Pub. L. 95-504, 1978 U.S.C.C.A.N. (1709 Stat.) 3737, 3773. "The purpose of deregulation was to allow competition and the marketplace to determine rates and practices in the air

transport industry." *Arkwright-Boston Manufacturers Mutual Insurance Co. v. Great Western Airlines, Inc.*, 767 F.2d 425, 427 (8th Cir. 1985); *See* 49 U.S.C. §1302(a)(4).[9]

Congress made sure that no other governmental entity stepped into the breach to defeat the purposes of that deregulation, by adopting the pre-emption clause, to pre-empt state regulation "relating to rates, routes, or services" of airlines. *See* 123 CONG. REC. 30595 (Sept. 23, 1977); Act of Oct. 24 1978, Pub. L. 95-504, 1978 U.S.C.C.A.N. (1709 Stat.) 3737, 3740; and 49 U.S.C. § 1302(a)(5).

The fundamental issue before the Court is whether Congress indeed only intended to keep the states from beginning the same sort of anti-competitive rate regulation that Congress had deregulated at the federal level, or whether Congress intended to make all regulation of airline practices a federal matter. The airline respondents, sensing a more favorable treatment at the hands of DOT, would have the Court go far beyond merely eliminating restraints on competition. The State urges that principles of federalism require a more conservative approach, preserving the deregulation Congress intended without the unintended result of preventing the very policing of the marketplace that can make competition work.

At least one court has concluded that Congress intended to pre-empt states from regulating only

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9 For this reason, at the same time it deregulated rates, routes, and services, Congress also took away from the airlines the protection they had previously enjoyed from the requirements of antitrust laws prohibiting price-fixing. *See* 49 U.S.C. § 1551(a)(2)(A).

those rates, routes, and services that were part of tariffs registered with the federal government under federal law. *San Diego Unified Port District v. Gianturco*, 651 F.2d 1306, 1310 n. 8 (9th Cir. 1981). This conclusion is in keeping with Congress' intent to deregulate only that economic activity which had previously been fully regulated.

One aspect of a determination of pre-emption of state law is the question whether a state-law-based cause of action has been supplanted by a private federal cause of action. The Court has said that the anti-deception section of the FAA, 49 U.S.C. § 1384, does not provide for a private cause of action. *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290 (1976). The absence of any means for the State or its citizens to vindicate the wrong of deceptive advertising militates even more strongly against pre-emption.[10]

3. Legislative history of the enactment of the pre-emption clause confirms that Congress did not intend to pre-empt state consumer protection laws.

Prior to enactment of the Airline Deregulation Act of 1978, there was no express pre-emption provision in the Federal Aviation Act. By adding 49 U.S.C. § 1305(a)(1), Congress sought to protect federal dereg-

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10 It is also worth noting that TWA does not apparently feel itself bound by the broad preemptive scope it advances here. In *Transworld Airlines, Inc. v. American Coupon Exchange, Inc.*, 913 F.2d 676 (9th Cir. 1990), TWA sued a ticket broker to stop its sale of TWA's frequent flyer tickets, alleging state-law-based claims of fraud and interference with business relations. *Id.*, at 689-693. It is hard to imagine a fact situation that so directly relates to rates as TWA's attempt here to prevent a broker from selling TWA tickets for cheaper than TWA chooses to sell them, and yet TWA did not hesitate to base its lawsuit there on state law claims.

ulation from state reregulation. In the section-by-section analysis of a precursor to the Airline Deregulation Act of 1978, the House Managers of the Bill stated:

> [W]ith the passage of legislation . . . loosening Federal regulation of airline services and fares, it is possible that some States will enact their own regulatory legislation, imposing utility type regulation on interstate airline service and fares. The Act includes a specific statutory provision precluding State interference with interstate service and fares.

123 CONG. REC. 30595 (1977).

Congress further expressed its concern that inconsistent state and federal economic regulation would result in "situations in which carriers have been required to charge different fares for passengers traveling between two cities, depending on whether these passengers were interstate passengers whose fares are regulated by the CAB, or intrastate passengers, whose fare is regulated by a State." H.R. Rep. No. 95-1211, 95th Cong., 2d. Sess., *reprinted in* 1978 U.S.C.C.A.N. 3737, 3751-3752. There are no references to pre-emption in either the Congressional Record or elsewhere in the various committee reports relating to the ADA that suggest that Congress intended to pre-empt anything more than "utility-type regulation."

Based on the legislative history, it is clear that Congress sought to protect the newly-deregulated airlines from state regulation that would interfere with the goals of economic deregulation of the air travel industry. It is impossible however, to conclude that

Congress intended to pre-empt state regulation of deceptive advertising.[11]

The saving clause was retained by Congress when it enacted the pre-emption clause. The Fifth Circuit placed full emphasis on the pre-emption clause and all but ignored the saving clause, on the apparent theory that the pre-emption clause was enacted more recently in time than the saving clause and therefore controlled. *See* App. to Cert. Pet. at 31a. For that reason, that court flatly ignored the Court's discussion of the effect of the saving clause in *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290 (1976). App. to Cert. Pet. at 31a. Admittedly, *Nader* was decided

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11 In its attempt to divine Congressional intent, the court of appeals placed some reliance on subsequent legislative history. *Trans World Airlines, Inc. v. Mattox*, 897 F.2d 773, 777-778 (5th Cir. 1990), App. to Cert. Pet. at 20a-22a. This subsequent history related to the sunset of the CAB and transfer of some of its functions to DOT. Civil Aeronautics Board Sunset Act of 1984, Pub. L. No. 98-443, 98 Stat. 1703 (1984). Although the Sunset Act did not make material changes to either the preemption clause or the saving clause, the court of appeals nonetheless cited the House committee report's statement that "federal regulation insures a uniform system of regulation and preempts regulation by the states." *Trans Worla Airlines, Inc. v. Mattox*, 897 F.2d 773, 778 (5th Cir. 1990), App. to Cert. Pet. at 21a. The State believes that a better approach is that taken by the Fifth Circuit in *Rogers v. Frito-Lay, Inc.* 611 F.2d 1074, 1080 (5th Cir. 1980), *cert. denied* 449 U.S. 889 (1981), when it observed:

> The retroactive wisdom provided by the subsequent speech of a member of Congress stating that yesterday we meant something that we did not say is an ephemeral guide to history. . . . What happened after a statute was enacted may be history and it may come from members of the Congress, but it is not part of the legislative history of the original enactment.

before Congress passed the Airline Deregulation Act of 1978, so the Court did not have before it the interplay between the two clauses, and the saving clause cannot be read to save the precise pre-emption that Congress enacted. But Congress' retention of the saving clause (as well as Section 411, the anti-d ception clause) when it added the pre-emption clause must be given some meaning. The State believes that a fair conclusion is that Congress indeed only intended limited pre-emption of economic regulation and did not intend to take away from the states the concurrent anti-deception jurisdiction they had long enjoyed. The only reason to reject this logic is if the language of the FAA forces a conclusion that Congress intended to pre-empt the states from regulating deceptive advertising by airlines. It does not.

4. Texas law and federal law relating to deceptive airline practices are complementary and square with the principles of federalism.

The Texas law is congruent with federal law relating to airline practices. State enforcement of consumer protection laws as an aspect of state police powers has a long history. *See, e.g., Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963); *Friedman v. Rogers*, 440 U.S. 1 (1979). Consider, for example, the long history of joint and successful enforcement of state consumer protection laws and of Section 5 of the Federal Trade Commission Act. 15 U.S.C. § 45(a)(1). Section 5, by itself, does not pre-empt a state's authority to enforce its own law. *See American Financial Services v. F.T.C.*, 767 F.2d 957, 989 (D.C. Cir. 1985); *Katherine Gibbs School (Inc.) v. F.T.C.*, 612 F.2d 658, 667 (2d Cir. 1979); *Double-Eagle Lubricants, Inc. v. State of Texas*, 248 F. Supp. 515, 517 (N.D. Tex. 1965). In fact, the Federal Trade

Commission encouraged development of state consumer protection laws because problems in the marketplace are beyond the enforcement capabilities of the federal government. D. PRIDGEN, CONSUMER PROTECTION AND THE LAW § 3.02[1].

The FAA has a prohibition against deceptive practices by airlines that is parallel to Texas law:

> The Board may, upon its own initiative or upon complaint by any air carrier, foreign air carrier, or ticket agent, if it considers that such action by it would be in the interest of the public, investigate and determine *whether any air carrier, foreign air carrier, or ticket agent has been or is engaged in unfair or deceptive practices* or unfair methods of competition in air transportation or the sale thereof. If the Board shall find, after notice and hearing, that such air carrier, foreign air carrier, or ticket agent is engaged in such unfair or deceptive practices or unfair methods of competition, it shall order such air carrier, foreign air carrier, or ticket agent to cease and desist from such practices or methods of competition.

49 U.S.C. § 1381(a) [emphasis added]. This section derives from Section 5 of the Federal Trade Commission Act. *Pan American World Airways, Inc. v. U.S.*, 371 U.S. 296, 303 (1963), and thus federal regulatory actions under this section should be construed according to the same federalist principles. It makes both good sense and good law.

This approach is confirmed by the one case of the Court to construe the FAA's anti-deception language. The Court held that Congress did not intend

exclusive federal regulation of deceptive airline practices. *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290, 301 (1976). The Court concluded that Congress, in providing for federal regulation of unfair or deceptive practices, did not intend to immunize airlines from liability under state law.

> In sum, § 411 confers upon the [Civil Aeronautics] Board [now, the Department of Transportation] a new and powerful weapon against unfair and deceptive practices that injure the public. But it does not represent the only, or the best, response to all challenged carrier actions that result in private wrongs.

Nader v. Allegheny Airlines, Inc., 426 U.S. at 303.

In reaching this conclusion, the Court relied in particular on the FAA's saving clause, 49 U.S.C. § 1506. *Nader v. Allegheny Airlines, Inc.*, 426 U.S. at 300. The saving clause provides:

> Nothing contained in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies.

49 U.S.C. § 1506. The Court concluded that the FAA and a common-law-based private action for damages for overbooking were not "absolutely inconsistent" and could coexist. 426 U.S. at 300.

State consumer protection laws are fully consistent with the FAA's parallel provisions. When the Civil Aeronautics Board ("CAB") promulgated a regulation to implement the FAA's pre-emption clause, it did not prohibit state regulation of deceptive advertising. 14 C.F.R. § 399.110.

The CAB analysis of its regulation indicates its conclusion that deceptive advertising regulation is not the type of regulation that Congress intended to pre-empt. In the comments accompanying its pre-emption regulation, the CAB discussed at length the kinds of state regulation pre-empted by the pre-emption clause. The CAB first stated that the states were clearly prohibited from directly regulating rates, routes and services. Statements of General Policy, Implementation of Preemption Provisions of the Airline Deregulation Act of 1978, 44 Fed. Reg. 9948, 9951 (1979). The CAB concluded that pre-emption extends to all of the economic factors that go into the *quid pro quo* for the passenger's fare. *Id*. The CAB also concluded that the scope of pre-emption extended beyond direct regulation of rates, routes and services to subjects such as regulation of capital structure, minimum insurance requirements, and bonding. Its rationale for including such regulations within the scope of pre-emption was that such regulations involved the balancing of various regulatory goals against the goal of free competition and that Congress had already decided to strike such balances in favor of competition. *Id*.

Application of the CAB's rationale to state regulation of deceptive airline advertising shows that state consumer protection laws do not fall within the scope of pre-empted regulation.[12] State consumer

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12 Later, in 1984, the CAB expressed its opinion that the states are not preempted from regulating advertising. GENERAL ACCOUNTING OFFICE, REPORT TO THE CHAIR OF THE OVERSIGHT SUBCOMMITTEE OF THE HOUSE COMMITTEE ON PUBLIC WORKS AND TRANSPORTATION, GAO/RCED-84-154 (1984), Appendix I, page 7. (It should be noted that, according to this report, DOT stated that it believed that state regulation of deceptive airline practices was preempted.)

protection laws such as the Texas statute at issue do not advance consumer protection at the expense of market competition. Instead, they protect consumers by protecting the competitive functioning of the marketplace.

In fact, the current DOT regulation that applies to advertising of the type at issue herein is identical to the enforcement provision taken by Texas. The existing federal regulation provides:

> The. . .[Civil Aeronautics Board, now DOT] considers any advertising or solicitation by a direct air carrier, indirect air carrier, or an agent of either, for passenger air transportation, a tour (*i.e.*, a combination of air transportation and ground accommodations), or a tour component (*e.g.*, a hotel stay) that states a price for such air transportation, tour, or tour component to be an unfair or deceptive practice, unless *the price stated is the entire price to be paid* by the customer to the air carrier, or agent for such air transportation, tour, or tour component.

14 C.F.R. § 399.84 [emphasis added].

The letters to the airlines that served as the airlines' pretext for initiating this action advised the airlines that their actions violated state law as well as federal law, and gave them the opportunity to cure their violations without being sued, although an opportunity to cure is not required by state law.

The type of deceptive advertising practices that resulted in the letters from Texas and the other states is exemplified by an advertisement placed by TWA,

J.A. at 165a. The TWA advertisement, which was the subject of separate litigation between TWA and the State of New York, advertises "unbelievably low fares to London, or elsewhere in Europe," offering a roundtrip air ticket *and* hotel *and* rental car for only $298. J.A. at 165a. The $298 fares are not just "unbelievably low"—they are in fact nonexistent. The actual cost of the ticket itself is $321, after the surcharges hidden in the fine print at the bottom of the advertisement are added in. J.A. at 165a. The hotel segment actually requires that the consumer first *pay for three nights in a London hotel*, after which the consumer receives three nights *outside of London*. J.A. at 165a. The rental car, for a minimum seven-day stay, was at no additional charge for only three days, after which the consumer was required to pay a minimum of $17 per day, plus more surcharges and taxes. J.A. at 165a.[13]

The exact nature of these hidden surcharges is telling, as well. Of the total amount of surcharges, more than half ($13) derived from federally-imposed taxes and fees, J.A. at 165a, but an additional $10 is a so-called "security surcharge" that is no more than an increased cost of doing business, which the airlines chose to factor out of the actual fare. *See* Affidavit of John M. Bloodworth, Vice President of Advertising and Marketing for Pan Am, J.A. at 146a-147a. There is no rationale for the exclusion of this amount from the full fare, except to keep the fare artificially low.

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13 For a detailed description of the facts surrounding this TWA advertisement, *see New York ex rel. Abrams v. Trans World Airlines, Inc.*, 728 F.Supp. 162, 167 (S.D.N.Y. 1990).

Therefore, the states wrote to the airlines. For example, the November 14, 1988, letter to Pan Am reads, in pertinent part:

> It is the position of the states [of California, Massachusetts, New York, Texas, and Washington] that any fuel, tax or other surcharge to a fare must be included in the total advertised price of the fare. Failure to do so violates our respective state consumer protection laws.
>
> Specific surcharges which must be included in the advertised fare are
>
> - the $3.00 international departure fee,
> - the $10.00 customs fee,
> - the "security" surcharge (usually $10.00), and
> - any fuel surcharge.
>
> It is no defense to claim that the surcharges are disclosed elsewhere in the advertisement. The deception, and thus the violation of our laws, occurs when the advertisement states a specific amount for a fare which is not in fact the true cost because the surcharges have been factored out. This deception cannot be cured by a footnote or other separate reference.
>
> The states do not wish to burden airlines unduly with respect to advertising their fares. Full disclosure in this instance is actually simpler—no footnote is required and

there is therefore less "clutter" in the advertisement.

More importantly, our citizens—and your customers—will not be deceived by this information.

J.A. at 152a.

That letter also discussed the existing federal regulation, 14 C.F.R. § 399.84, and the fact that its requirements were parallel to the requirements of state law. J.A. at 153a. The letter to Pan Am, and similar ones to TWA, Continental, British Airways, and Lufthansa (no state ever contacted the other carriers that intervened in this action), went on to discuss the interplay between DOT activity and state activity, as well as the states' position that they were not preempted from stopping deceptive advertising. J.A. at 153a. Rather than take advantage of the informal resolution offered by this letter, the airlines chose to initiate this litigation.[14]

One of the issues raised in those letters was the apparent attempt by DOT to circumvent the existing federal regulation relating to surcharges, an attempt that was ultimately unsuccessful. DOT has consistently sided with the airline respondents in opposing state regulation of airline advertising and by permitting the exact practices which the state would prohibit. J.A. at 98a.

In *Alaska v. U.S. Department of Transportation*, 868 F.2d 441 (D.C. Cir. 1989), the court held that DOT had acted unlawfully in adopting orders that were designed to circumvent the existing regulation, 14 C.F.R. § 399.84, without actually amending it. The court recognized that the existing regulation prohibited separate listing of surcharges. *Id.* at 444. Because DOT's orders, which would have made formal DOT's policy not to enforce the existing regulation, were not adopted in keeping with the notice-and-comment procedures required by the Administrative Procedure Act, the court invalidated them, leaving the regulation as the existing federal law on the matter. *Id.* at 441.[15]

Thus, Texas law and federal law and regulation remain in twain. The mere fact that Texas may impose liability over and above federal law is no basis for a court to find pre-emption. *English v. General Electric* Co., 110 S.Ct. 2270, 2280 (199?) (*quoting California v. ARC America Corp.*, 109 S.Ct. 1661, 1667 (1989)). Nor is the fact that compliance with state consumer protection laws might seem a burden to an airline that desires to compete unfettered by rules of conduct. *See Ingersoll-Rand Co. v. McClendon*, 111 S.Ct. 478, 483 (1990).

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14 And they are still at it. Attached to this Brief as an Appendix is a copy of a recent advertisement for TWA that appeared in *The New Yorker* (December 16, 1991). The advertised fare is $416 from New York to Israel. In fact, the fare is $875—the $416 is one-way only (but a round-trip purchase is required), and TWA continues to delete from the advertised fare a number of surcharges, this time totalling $43 (significantly above the $23 TWA was excluding from the fare when it filed this action in 1988), from the advertised fare.

15 After losing in this effort, DOT republished a formal Notice of Proposed Rulemaking that would amend Section 399.84 to permit, *inter alia*, excluding certain surcharges from the advertised fare. 54 Fed. Reg. 31052 (July 26, 1989). As of late 1991, no final action had been taken on this proposed rule, nor had DOT set a date for such final action. 56 Fed. Reg. 53614 (October 21, 1991).

5. Except for this case, court interpretations of FAA pre-emption of state regulation of deceptive airline practices are consistent in opposing pre-emption.

Court constructions of the pre-emptive effect of the FAA, as applied to a variety of practices and state laws, vary widely depending on the facts of the case and the state laws involved. However, with respect to state consumer protection laws, such as the Texas law involved here, there is an island of agreement in an otherwise turbulent sea of dispute.

In *West v. Northwest Airlines, Inc.*, 923 F.2d 657 (9th Cir. 1991), *petition for cert. filed*, No. 91-505, the Ninth Circuit held that Section 105 of the Federal Aviation Act pre-empts claims based on state law ". . . only when the underlying statute or regulation itself relates to airline services, regardless of whether the claim arises from a factual setting involving airline services. Thus, state laws that merely have an *effect* on airline services are not preempted." 923 F.2d at 660 [emphasis in original].

The Ninth Circuit does not discuss the Fifth Circuit's opinion in this case. It does, however, cite *New York ex rel. Abrams v. Trans World Airlines, Inc.*, 728 F.Supp. 162 (S.D.N.Y. 1990). The district court there was aware of the district court's holding in this case and did not follow it. *Id.*; 728 F.Supp. at 166-167. The court drew a distinction between regulation of rates, routes, and services, and regulation of deceptive advertising.

> [A]ny relationship between New York's enforcement of its laws against deceptive advertising and Pan Am's rates, routes, and services is remote and indirect. In challenging Pan Am's advertising, New York does not care how much Pan Am charges, where it flies, or what amenities it provides its passengers. Its sole concern is with the manner in which Pan Am advertises those matters to New York consumers. Thus, as far as New York is concerned, Pan Am is free to charge $200 or $2000 for a flight from LaGuardia to London, but it cannot take out a full-page newspaper advertisement telling consumers the fare is $200 if it is in fact $2000. Similarly, Pan Am remains free to route a plane from Ithaca to Istanbul with as many stops in between as it chooses, but it cannot market that flight to New York consumers as a "direct" flight.

New York ex rel. Abrams v. Trans World Airlines, Inc., 728 F.Supp. 162, 176 (S.D.N.Y. 1990).[16] The district court has perfectly summarized the approach to regulation taken by the State of Texas in this case. Texas does not contest the right of an airline to determine its own rates, routes, and services, but only the ability of an airline to lie to Texans about what rates, routes, and services it has decided to offer.

---

16 This opinion involved three cases: New York's separate suits against TWA and Pan Am for deceptive advertising (initially filed in New York State court, and removed to federal court by TWA and Pan Am) and Pan Am's suit against New York (initially filed in federal court). The district court remanded to state court New York's suits against TWA and Pan Am and dismissed most of Pan Am's affirmative claims in the original action. Pan Am subsequently dismissed that action and the state court denied New York the relief it sought, finding that New York was collaterally estopped from relitigating the issue whether the advertisements were deceptive because of the Fifth Circuit's decision that such actions were preempted by federal law. *New York ex rel. Abrams v. Trans World Airlines, Inc'*, 575 N.Y.S.2d 1 (App. Div. 1991).

Another federal district court took a similar approach, in a case involving a private suit under a state consumer protection law. In *Brunwasser v. Trans World Airlines, Inc.*, 541 F. Supp. 1338 (W.D. Pa. 1982), a consumer alleged that a TWA advertisement for a special non-stop Pittsburgh to London fare was deceptive and misleading. *Id.* at 1347. The court held that this cause of action was not pre-empted, but preserved by the saving clause. *Id.* at 1345. Here, too, the analysis is consistent.

The only state court case relating to application of state deceptive advertising laws to airline practices reached the same conclusion. In *People v. Western Airlines, Inc.*, 155 Cal. App. 3d 597, 600, 202 Cal. Rptr. 237 (Cal. App. 1984), *appeal denied* (Cal. Sup. 1984), *cert. denied*, 469 U.S. 1132 (1985), the California court of appeals considered the effect of the pre-emption clause and concluded that state regulation of an airline's manner of advertising rates and services was not within the ambit of the pre-emption clause. *Id.*

In the only case that might appear to give some credence to the case for pre-emption of state regulation of deceptive advertising, the Seventh Circuit held that the FAA does pre-empt Illinois' consumer protection law to the extent that the law would require an ". . .air carrier to deal with a would-be agent who refuses to respect a contract restricting advertising of discount prices." *Illinois Corporate Travel, Inc. v. American Airlines, Inc.*, 889 F.2d 751, 755 (7th Cir. 1989), *cert. denied*, 110 S.Ct. 1948 (1990). However, that court took care to clarify that its ruling did not touch on the "extent to which state laws may control deceptive advertising, require disclosures, or enforce (as opposed to upset) contracts between carriers and agents." *Id.* at 755. In an earlier decision of that circuit

written by Judge Easterbrook, the author of the opinion in *Illinois Corporate Travel*, the court had said, in dictum, that common law remedies are available in cases of fraud by airlines, citing to *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290 (1976), discussed above. *Bieneman v. City of Chicago*, 864 F.2d 463, 471 (7th Cir. 1988). It therefore appears likely that, if the Seventh Circuit were to address the issue directly, it would rule in favor of state regulation of deceptive advertising and against pre-emption.

Although courts have been uniform in refusing to pre-empt state regulation of deceptive advertising by airlines, the same cannot be said of other types of cases involving pre-emption by the FAA.

Perhaps the most perplexing opinion is one pending before the Court, *Federal Express Corp. v. California Public Utilities Comm'n*, 936 F.2d 1075 (9th Cir. 1991), *petition for cert. filed*, No. 91-502. In that case, in apparent full conflict with its earlier decision in *West v. Northwest Airlines, Inc.*, 923 F.2d 657 (9th Cir. 1990), *petition for cert. filed*, No. 91-505, the Ninth Circuit held that the pre-emption clause prevented state regulation of the rates, routes, and services of Federal Express's intrastate trucking activities, which Federal Express chose to conduct as part of its package delivery system. *Id.* at 1078. The court distinguished *Federal Express* from *West* by saying that the former involved regulation of an integrated air-cargo system, which Congress specifically intended to encourage and protect from state regulation, but that the latter involved regulation relating to the field of contract. *Id.* at 1078-1079. This distinction does not appear to be warranted by the general rules relating to pre-emption, established by the Court and discussed above.

Other reported cases evince a similar confusion of analysis and differing results. *See, e.g., French v. Pan Am Express, Inc.*, 869 F.2d 1 (1st Cir. 1989); *O'Carroll v. American Airlines, Inc.*, 863 F.2d 11, 13 (5th Cir. 1989); *Anderson v. USAir, Inc.*, 818 F.2d 49, 57 (D.C. Cir. 1987); *Air Transport Ass'n of America v. Public Utilities Commission of California*, 833 F.2d 200, 207 (9th Cir. 1987), *cert. denied*, 108 S.Ct. 2904 (1988); *Hingson v. Pacific Southwest Airlines*, 743 F.2d 1408, 1415 (9th Cir. 1984); and *In re Air Crash Disaster at John F. Kennedy International Airport on June 24, 1975*, 635 F.2d 67, 74 (2d Cir. 1980).

6. ERISA is not a proper analogue.

The Fifth Circuit placed great weight on the similarity of the pre-emption clause in the FAA to the pre-emption clause in the Employee Retirement Income Security Act of 1974 ("ERISA"). *Trans World Airlines, Inc. v. Mattox*, 897 F.2d 773, 780 (5th Cir. 1990), App. to Cert. Pet. at 25a. The prime underpinning of the limitless reading it gave the "relating to" language of the FAA is the broad reading given by the Court to similar language in ERISA. That reliance is misplaced, for ERISA is not an analogous law.

ERISA is a comprehensive statute which Congress adopted after a careful study of private retirement pension plans. *Ingersoll-Rand Co. v. McClendon*, 111 S.Ct. 478, 482 (1990); *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 510 (1981). ERISA marked the decision of Congress to enact broad-based federal regulation of pension plans. The Airline Deregulation Act of 1978, on the other hand, marked only limited deregulation of what had been a highly-regulated industry. As it relates to false advertising and consumer protection, as opposed to utility-

type ratemaking, the FAA is not at all comprehensive.

Beyond that, the pre-empting provisions of ERISA "perhaps are not a model of legislative drafting." *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 739 (1985). Therefore, reference to ERISA's broadly-pre-emptive effect, based solely on the similarity of two words, ignores both the flaws of the ERISA language and its fundamental difference from the FAA.

ERISA pre-emption is not sweeping because of its "relates to" language; rather, that "relates to" language is read broadly because of the wide and inclusive sweep of the comprehensive ERISA scheme. *Ingersoll-Rand Co. v. McClendon*, 111 S.Ct. 478, 482 (1990). No such sweep exists in the FAA Act, nor should the Court strain to find one.

But perhaps the best argument against a rote, word-for-word comparison of ERISA's broad pre-emption clause to the pre-emption clause of the FAA is made by a comparison of the different pre-emptive schemes of the two laws.

The scope of ERISA pre-emption is dependent on three separate sections of that law: (1) the pre-emption clause itself, 29 U.S.C. § 514(a), (2) the saving clause, 29 U.S.C. § 1144(b)(2)(A), and (3) the deemer clause, 29 U.S.C. § 1144(b)(2)(B). FAA pre-emption, on the other hand, is governed by only two sections of that law: (1) the pre-emption clause, 49 U.S.C. § 1305(a)(1), and (2) the saving clause, 49 U.S.C. § 1506. These respective clauses operate as follows:

ERISA	Federal Aviation Act
Pre-emption clause Except as provided in the saving clause, ERISA supersedes any and all State laws "insofar as they may now or hereafter relate to any employee benefit plan." 29 U.S.C. § 514(a)	**Pre-emption clause** FAA pre-empts any State law "relating to rates, routes, or services of any air carrier." 49 U.S.C. § 1305(a)(1)
Saving clause Except as in the deemer, nothing in ERISA "shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities." 29 U.S.C. § 1144(b)(2)(A)	**Saving clause** Nothing in the FAA "shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies." 49 U.S.C. § 1506
Deemer clause No employee benefit plan "shall be deemed . . . to be engaged in the business of insurance or banking for purposes of any law of any State purporting to regulate insurance companies, insurance contracts, banks, trust companies, or investment companies." 29 U.S.C. § 1144(b)(2)(B)	**Deemer clause** [None]

The wording of the pre-emption clauses in both ERISA and the FAA is in fact similar. After that, however, the similarity ceases. The saving clause of ERISA reserves to the States only those laws that regulate insurance, banking, and securities, subject to the deemer clause. In the FAA, on the other hand, Congress reserved to the States *all remedies* provided by common law or statute. Many of the Court's decisions on ERISA pre-emption turn on the question of whether State laws indeed regulate insurance, banking, and securities and thus come within the initial scope of the saving clause. *See, e.g., FMC Corp. v. Holliday*, 111 S.Ct. 403, 409 (1990).

Furthermore, unlike ERISA, the FAA has no deemer clause to diminish the effect of its savings clause. And it is in that distinction that the greatest difference lies. What the ERISA saving clause seemingly reserved to the states, the deemer clause partially pulls back to exclusively federal regulation. For example, although an insured employee benefit plan is subject to indirect state regulation to the extent that the state regulates the insurance company, a self-funded employee benefit plan is not to be deemed as in the business of insurance and is therefore not subject to state regulation. *FMC Corp. v. Holliday*, 111 S.Ct. 403, 409 (1990).

The FAA does not in any way similarly diminish its own saving clause. The Fifth Circuit failed to include the proper effect of the saving clause in its construction of the pre-emption clause.

As a simple matter of reading the statutes, it is clear that ERISA is not a fit model for construing the pre-emptive effect of the FAA.

CONCLUSION

For the reasons stated, the judgments of the courts below should be reversed.

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APPENDIX

TWA Advertisement

The New Yorker

December 16, 1991

Advertising Insert, unpaginated

[Reduced 70% from original]

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TWA makes it convenient to visit Israel with direct service to Tel Aviv. You'll arrive rested and ready to visit the Western Wall of Jerusalem's Old City, the Walls of Jericho. Eager to explore the marine wonders beneath the Red Sea, historical Masada and all the pleasures Israel has to offer.

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Basic Conditions: Fare featured is valid on selected roundtrip purchase, agent ticketed, non-refundable, as valid for travel effective now thru 1/31/92. Fare is higher 12/16-12/24/91. Fare is subject to change and government approval. Charges if itinerary permits upgrade. 14 day advance purchase required. Minimum stay required is 6 days, maximum stay allowed is 21 days. Seats are limited and may not be available on all flights or days of week. $50 fee for itinerary/passenger changes (applies to seasons, surcharge and U.S. departure tax not included). $35 based departure tax not included. Fare applies to/from U.S. international Airport. Moriah Hotels: Rate shown is per person based on double occupancy and does not include 15% service charge. Minimum stay of 8 nights including at least one night at the listed properties and required. Rates valid now through 12/30/92. Peak season supplement of $8 per person applies 12/25/91-1/5/92. All resort hotels are subject to availability. Eldan: Price excludes optional CDW and LDW, and mandatory theft protection which apply. Rate valid now thru 3/31/92 except for holiday periods 12/22/91-1/5/92 when higher rate applies.

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No. 90-1604

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

DAN MORALES,
ATTORNEY GENERAL OF TEXAS,
Petitioner,
v.

TRANS WORLD AIRLINES, INC., *et al.*,
Respondents

BRIEF OF PETITIONER

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January 1992

QUESTION PRESENTED

Can airlines falsely advertise air fares in Texas, in total disregard of state law prohibitions, merely because the federal government has pre-emptive regulatory authority over an airline's "rates, routes, or services" under the Federal Aviation Act?

LIST OF PARTIES

This petition is filed by Texas Attorney General Dan Morales.[1] In addition to Texas, 33 state attorneys general are parties to this proceeding, having been defendants in the proceedings below.[2]

The plaintiffs/appellees below were Trans World Airlines, Inc.; Continental Airlines, Inc.; British Airways PLC; Air Canada; Compagnie Nationale Air France; Alitalia-Linee Aeree Italiane, S.p.A.; El Al Israel Airlines Ltd.; Finnair; Lufthansa German Airlines; Japan Air Lines Company, Ltd.; Qantas Airways Ltd.; Scandinavian Airlines System; Viacao Aerea Rio-Grandense (VARIG); and Pan American World Airways, Inc.[3]

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1 Petitioner will be referred to herein as "the State" or "Texas."

2 These are the Attorneys General of the States of Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Florida, Idaho, Illinois, Iowa, Kansas, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, Nevada, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Rhode Island, South Dakota, Tennessee, Vermont, Washington, West Virginia, Wisconsin and Wyoming. A petition for a writ of certiorari filed by 31 of these state attorneys general (all but the attorneys general of Arkansas and Maine) is pending before the Court. *Attorney General of California v. Trans World Airlines, Inc.*, No. 90-1606.

3 These 14 respondents will be jointly referred to as "airlines" or "respondents."

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No. 90-1604

IN THE SUPREME COURT
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October Term, 1991

DAN MORALES,
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Petitioner,
v.

TRANS WORLD AIRLINES, INC., *et al.*,
Respondents

BRIEF OF PETITIONER

OPINIONS BELOW

The January 18, 1991, opinion of the United States Court of Appeals for the Fifth Circuit is published at 924 F.2d 1055 (5th Cir. 1991) and is reprinted at App. to Cert. Pet. 1a.

This case has been the subject of a prior appeal from the district court's issuance of a preliminary injunction, which the court of appeals affirmed on April 3, 1990, in an opinion published at 897 F.2d 773 (5th Cir. 1990); App. to Cert. Pet. 13a. On October 15, 1990, the Court denied Texas' petition for writ of certiorari to review the preliminary injunction, Justice

Blackmun noting that he would dismiss the petition as moot. 111 S.Ct. 308 (1990).

On remand, the district court entered a permanent injunction and final judgment on June 1, 1990, which is reprinted at App. to Cert. Pet. 8a and which is virtually identical to the preliminary injunction that the court of appeals affirmed in its prior order. On January 18, 1991, the court of appeals affirmed the permanent injunction, based on its prior opinion with respect to the merits of the preliminary injunction. App. to Cert. Pet. at 1a. On November 27, 1991, the Court granted the petition for a writ of certiorari.

JURISDICTION

A petition for a writ of certiorari was timely filed on April 16, 1991. The Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Federal Aviation Act § 105(a)(1), 49 U.S.C. § 1305(a)(1) [in pertinent part]. Federal preemption.

[N]o State or political subdivision thereof and no interstate agency or other political agency of two or more States shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier having authority under subchapter IV of this chapter to provide air transportation.

Federal Aviation Act § 411(a), 49 U.S.C. § 1381(a). Methods of competition.

The Board may, upon its own initiative or upon complaint by any air carrier, foreign air carrier, or ticket agent, if it considers that such action by it would be in the interest of the public, investigate and determine whether any air carrier, foreign air carrier, or ticket agent has been or is engaged in unfair or deceptive practices or unfair methods of competition in air transportation or the sale thereof. If the Board shall find, after notice and hearing, that such air carrier, foreign air carrier, or ticket agent is engaged in such unfair or deceptive practices or unfair methods of competition, it shall order such air carrier, foreign air carrier, or ticket agent to cease and desist from such practices or methods of competition.

Federal Aviation Act § 1106, 49 U.S.C. § 1506. Remedies not exclusive.

Nothing contained in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies.

Texas Deceptive Trade Practices—Consumer Protection Act, TEX. BUS. & COM. CODE § 17.46(a) [in pertinent part].

False, misleading, or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful and are subject to action by the consumer protection division [of the Texas Attorney General] . . ..

Texas Deceptive Trade Practices—Consumer Protection Act, TEX. BUS. & COM. CODE § 17.46(b) *[in pertinent part]*.

[T]he term "false, misleading, or deceptive acts or practices" includes, but is not limited to, the following acts:

* * *

(9) advertising goods or services with intent not to sell them as advertised;

* * *

(11) making false or misleading statements of fact concerning the reasons for, existence of, or amount of price reductions;

* * *

STATEMENT OF THE CASE

This is a suit brought by a number of airlines to prevent state attorneys general from fulfilling their statutorily-imposed mandate to protect their citizens from deceptive advertising. It arises from the efforts of the Attorney General of Texas and the attorneys general of other states to enforce their state false advertising laws.

1. Facts of the case.

In late 1988, the Attorney General of Texas, on behalf of Texas and four other states (California, Massachusetts, New York, and Washington), wrote letters to respondents Trans World Airlines, Inc. ("TWA"); Continental Airlines, Inc. ("Continental"); British Airways PLC ("British Airways"); Pan American World Airways, Inc. ("Pan Am"); and Lufthansa German Airlines ("Lufthansa"), advising them that their advertisements for low fare tickets were deceptive and violated the laws of the five states, as well as federal law. *See, e.g.*, J.A. at 60a.

These letters did not represent the first contact between the airlines and the State of Texas. For example, in 1987, the Texas Attorney General wrote to several airlines, including TWA and Continental, asking that they cease excluding a fuel surcharge from their advertised fares. *See, e.g.*, J.A. at 149a.

Even prior to those letters, Texas and other states had put the airlines on notice as to what were considered deceptive advertising practices, through adoption of guidelines on air fare advertising by the National Association of Attorneys General ("NAAG"). The Attorney General of Texas and the attorneys general of a number of other states served

on a task force that met with the airlines and other interested parties. The result of these meetings was the REPORT AND RECOMMENDATIONS OF THE NAAG TASK FORCE ON THE AIR TRAVEL INDUSTRY, 53 Antitrust & Trade Reg. Rep (BNA) No. 1345, Special Supplement (December 17, 1987) ("NAAG REPORT"). The main portion of the NAAG REPORT was devoted to Guidelines and Commentary relating to air fare advertising.[4]

The Guidelines and Commentary were explicitly not intended to be new law or regulation, but "merely explain in detail how existing state laws apply to air fare advertising . . .." U.S. Brief App. 11a. In adopting them, NAAG was clear that they were general enforcement policies only, and were subject to individual prosecutorial discretion and variations in individual state and common law. U.S. Brief App. 7a.[5]

Rather than avail themselves of the repeated opportunities to avoid litigation by advertising hon-

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4 The Guidelines and Commentary from the NAAG REPORT are attached to the Brief of the United States, at Appendix 9a-41a ("U.S. Brief App.").

5 An excellent summary of the development of the NAAG Guidelines can be found in *New York ex rel. Abrams v. Trans World Airlines, Inc.*, 728 F.Supp. 162, 168 (S.D.N.Y. 1990). It must be stressed that the Guidelines are no more than that—guidelines that were intended to put the airlines on notice as to what practices violated state law, so that they could bring themselves into conformity with state law and thus avoid needless litigation. NAAG REPORT at S-2.

estly, in compliance with both state and federal law, the respondent airlines chose to initiate this litigation.

2. History of the litigation. On January 23, 1989, TWA, Continental, and British Airways commenced this action in the United States District Court for the Western District of Texas, Austin Division, in which the Texas Attorney General was the only named defendant. This action sought both preliminary and permanent relief prohibiting the Texas Attorney General and unspecified others from enforcing the Texas Deceptive Trade Practices Act, or any other (also unspecified) state law, against airline advertising, an injunction that would effectively insulate these airlines from prosecution by the State of Texas for false or deceptive advertising.

On January 30, 1989, the district court granted the airlines a preliminary injunction that enjoined the Texas Attorney General and all other persons acting in concert or participation with him, *and* "all other persons having actual knowledge of" the injunction, from:

> [I]nitiating any enforcement action pursuant to Tex. Bus. & Comm. Code §§17.41 et seq. or any other provision of state law, which would seek *to regulate or restrict any aspect of the individually named plaintiff airlines' air fare advertising* or the [*sic*] operations involving their rates, routes and/or services.

App. to Cert. Pet. 50a [emphasis added].

On April 26, 1989, the district court permitted 10 additional airlines to intervene and expanded the preliminary injunction to include 33 more attorneys general within its scope. App. to Cert. Pet. 52a. In ef-

fect, this order applied to all state attorneys general who had expressed a desire to enforce their state laws, even though most of them had taken no enforcement action whatsoever at the time the suit was filed or when the injunction was expanded to cover them.

On appeal, the court of appeals affirmed every action of the district court, holding that the district court's sweeping preliminary injunction was proper because "§1305(a)(1) expressly preempts state deceptive advertising laws as applied to airline fare advertising." App. to Cert. Pet. 34a.[6]

The preliminary injunction was converted by the district court into a permanent injunction, on June 1, 1990. App. to Cert. Pet. 8a. The relevant provisions of the permanent injunction, and the basis therefor (federal pre-emption of state consumer protection laws), are the same as those in the preliminary injunction.

On January 18, 1991, the Fifth Circuit affirmed the issuance of the permanent injunction, based on its determination that its prior opinion on the merits of the preliminary injunction was the law of the case. App. to Cert. Pet. 1a. The Court granted this petition for certiorari on November 27, 1991.

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6 The Court denied Texas' initial petition for writ of certiorari with respect to the Fifth Circuit's opinion upholding the preliminary injunction, on October 15, 1990, Justice Blackmun noting that he would have dismissed the petition as moot. 111 S.Ct. 308 (1990).

SUMMARY OF ARGUMENT

Introduction. This case again raises the question of the continued vitality of our federalist system of government—the interplay between national authority and the rights of the states to enact and enforce their own laws. There is significant confusion in lower federal and state courts as to the meaning of the pre-emption clause of the Federal Aviation Act ("FAA"), 49 U.S.C. § 1305(a)(1). The State of Texas, unsurprisingly, urges the Court to rule that it is free to enforce its consumer protection laws[7] to stop deceptive advertising by airlines. The airlines that chose to bring this action, equally unsurprisingly, want the Court to rule that they are free to operate without having to bother with complying with these state laws. The Court must now determine which of these two irreconcilable viewpoints best meets the demands of public policy, both as expressed by Congress in the FAA and as established by the policies of federalism, through the Constitution and the prior decisions of the Court.

1. Application of state consumer protection laws to airlines fosters competition. The Texas law at issue is the Texas Deceptive Trade Practices–Consumer Protection Act, TEX. BUS. & COM. CODE §§ 17.41 *et seq.*

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7 The specific Texas law at issue is the Deceptive Trade Practices–Consumer Protection Act, TEX. BUS. & COM. CODE § 17.41 *et seq.* In brief, the Texas law prohibits all false, misleading, and deceptive acts and practices in the conduct of trade and commerce. It is similar in effect to laws in other states. For a good overview of the various state laws, *see* D. PRIDGEN, CONSUMER PROTECTION AND THE LAW § 3.01 *et seq.* For clarity, all such state laws will be referred to herein as "consumer protection" laws.

That consumer protection law, just as the other state consumer protection laws invalidated by the courts below, is one of general applicability to all commercial practices, and does not have any special connection or reference to airline rates, routes, or services, or to any other airline practice. The law serves to keep competition honest and functioning properly.

2. **Congress intended only limited deregulation of airline practices through the FAA.** The Airline Deregulation Act of 1978, PUB. L. NO. 95-504, §4, 92 STAT. 1705 (1978), removed many of the anti-competitive economic regulations that had been installed to nurture the early development of the air travel industry. Congress intended to take the federal government out of the business of the economic, utility-like regulation of the rates, routes, and services of carriers providing air transportation and, at the same time, intended to see that states did not merely step in, and by re-regulating, undo what Congress had just done. However, Congress did not choose to take the federal government out of its role in regulating deceptive practices by airlines, a role it had long shared with the states.

3. **Legislative history of the enactment of the pre-emption clause confirms that Congress did not intend to pre-empt state consumer protection laws.** Examination of the legislative history of the Airline Deregulation Act of 1978 confirms that all Congress intended, when it adopted the limited pre-emption section of the Act, was to prevent the states from nullifying Congress' intent to permit free market competition within the air travel industry.

4. **Texas law and federal law relating to deceptive airline practices are complementary and square with the principles of federalism.** The effect of the Texas law is the same as that of the FAA's anti-deception standard, and is on all fours with existing federal regulation. Congress never intended to preempt all state consumer protection efforts relating to airlines. *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290 (1976).

5. **Except for this case, court interpretations of FAA pre-emption of state regulation of deceptive airline practices are consistent in opposing pre-emption.** This case is the only case in the federal or state courts that has found broad pre-emption of a state's enforcement of its consumer protection laws with respect to deceptive practices by airlines.

6. **ERISA is not a proper analogue.** The courts below applied a near-ritualistic use of similar language in the Employee Retirement Income Security Act of 1974 ("ERISA") to divine the intent of Congress in the FAA. However, ERISA is a statute whose pre-emptive effect is virtually unique and which serves poorly as a template for construing the FAA.

ARGUMENT

1. Application of state consumer protection laws to airlines fosters competition.

State regulation of air fare advertising plays an essential role in ensuring efficient functioning of the marketplace. It makes the marketplace function better by making it function honestly. This benefits the consumer, who gets the information needed to make a proper purchasing decision, and it rewards the honest airline, which does not lose sales to the dishonest one.

The state laws at issue are general consumer protection laws enacted by state legislatures to prevent deceptive and misleading commercial practices directed at their citizens. None of them is directed at airline practices in particular. For example, the Texas consumer protection law provides:

> False, misleading, or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful . . .. [T]he term "false, misleading, or deceptive acts or practices" includes, but is not limited to . . . advertising goods or services with intent not to sell them as advertised . . . [or] making false or misleading statements of fact concerning the reasons for, existence of, or amount of price reductions . . ..

TEX. BUS. & COM. CODE §§ 17.46(a), 17.46(b)(9), and 17.46(b)(11).

This law applies to used car dealers, pyramid schemers, and snake oil sellers. It also applies to other forms of travel with which the airlines directly compete–trains, buses, rental cars–and to others in the travel industry–travel agents, hotels, motels. The law has no connection with or reference to airlines and functions irrespective of the existence of the FAA and the presence or absence of federal regulation. *See, e.g., Ingersoll-Rand Co. v. McClendon*, 111 S.Ct. 478, 483 (1990).

Public policy weighs heavily in favor of the continued ability of the State to regulate deceptive advertising aimed at its citizens. If the logic of the courts below is extended, it pre-empts all state laws that can be argued to "relate to" airline operations—and not just directly to rates, routes, and services—and the effect of this would be absurd. State laws that prohibit

gambling, prostitution, or the sale of illegal drugs could be avoided merely by the inception of those activities by an airline. This is not what Congress intended. Nor is the less-severe but nonetheless significant grant of immunity from state consumer protection laws given the airlines by the courts below.

2. Congress intended only limited deregulation of airline practices through the FAA.

The genesis of the limited pre-emption of state regulation of airline practices was the enactment of the Airline Deregulation Act of 1978, Pub. L. No. 95-504, §4, 92 STAT. 1705 (1978), which removed many of the anti-competitive economic regulations that had been installed to nurture the early development of the air travel industry.

The primary features of deregulation were the liberalization of restrictions on entry into the industry and significant reductions in the federal government's authority to regulate rates, routes, and services of air transportation. *See generally*, Freeman, *State Regulation of Airlines and the Airline Deregulation Act of 1978*, 44 J. AIR L. & COM. 747, 754 (1979).[8] The primary motivation for eliminating such direct economic regulation of the industry was the belief that the air travel industry could more effectively be governed by market forces than by the federal government. *Id.*

The Airline Deregulation Act amended the FAA in many ways designed to effect Congress's intent to limit direct economic regulation of the air travel industry. Of specific relevance to this case are two sec-

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8 Mr. Freeman was a Senior Attorney in the Office of the General Counsel of the CAB at the time he wrote this article.

tions, the pre-emption clause and the saving clause, which must be read together.

> [N]o State or political subdivision thereof and no interstate agency or other political agency of two or more States shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier having authority under subchapter IV of this chapter to provide air transportation.

49 U.S.C. § 1305(a)(1) [in pertinent part].

> Nothing contained in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies.

49 U.S.C. § 1506.

It is clear that Congress intended to deregulate all federal and state economic regulation that it viewed as anti-competitive. Congress' purpose was to encourage competition among the airlines by taking the federal government out of the business of utility-type economic regulation of air transportation (setting rates, routes, and services). Prior to 1978, the federal government had strictly dictated the rates, routes, and services an airline could offer. By terminating this control, Congress hoped to encourage competition among airlines and bring ticket prices down. 49 U.S.C. § 1302(a)(3) and 1302(a)(4); Act of Oct. 24, 1978, Pub. L. 95-504, 1978 U.S.C.C.A.N. (1709 Stat.) 3737, 3773. "The purpose of deregulation was to allow competition and the marketplace to determine rates and practices in the air

transport industry." *Arkwright-Boston Manufacturers Mutual Insurance Co. v. Great Western Airlines, Inc.*, 767 F.2d 425, 427 (8th Cir. 1985); *see* 49 U.S.C. §1302(a)(4).[9]

Congress made sure that no other governmental entity stepped into the breach to defeat the purposes of that deregulation, by adopting the pre-emption clause, to pre-empt state regulation "relating to rates, routes, or services" of airlines. *See* 123 CONG. REC. 30595 (Sept. 23, 1977); Act of Oct. 24 1978, Pub. L. 95-504, 1978 U.S.C.C.A.N. (1709 Stat.) 3737, 3740; and 49 U.S.C. § 1302(a)(5).

The fundamental issue before the Court is whether Congress indeed only intended to keep the states from beginning the same sort of anti-competitive rate regulation that Congress had deregulated at the federal level, or whether Congress intended to make all regulation of airline practices a federal matter. The airline respondents, sensing a more favorable treatment at the hands of the Department of Transportation ("DOT"), would have the Court go far beyond merely eliminating restraints on competition. The State urges that principles of federalism require a more conservative approach, preserving the deregulation Congress intended without the unintended result of preventing the very policing of the marketplace that can make competition work.

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9 For this reason, at the same time it deregulated rates, routes, and services, Congress also took away from the airlines the protection they had previously enjoyed from the requirements of antitrust laws prohibiting price-fixing. *See* 49 U.S.C. § 1551(a)(2)(A).

At least one court has concluded that Congress intended to pre-empt states from regulating only those rates, routes, and services that were part of tariffs registered with the federal government under federal law. *San Diego Unified Port District v. Gianturco*, 651 F.2d 1306, 1310 n. 8 (9th Cir. 1981). This conclusion is in keeping with Congress' intent to deregulate only that economic activity which had previously been fully regulated.

One aspect of a determination of pre-emption of state law is the question whether a state-law-based cause of action has been supplanted by a private federal cause of action. The Court has said that the anti-deception section of the FAA, 49 U.S.C. § 1384, does not provide for a private cause of action. *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290 (1976). The absence of any means for the State or its citizens to vindicate the wrong of deceptive advertising militates even more strongly against pre-emption.[10]

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10 It is also worth noting that TWA does not apparently feel itself bound by the broad preemptive scope it advances here. In *Transworld Airlines, Inc. v. American Coupon Exchange, Inc.*, 913 F.2d 676 (9th Cir. 1990), TWA sued a ticket broker to stop its sale of TWA's frequent flyer tickets, alleging state-law-based claims of fraud and interference with business relations. *Id.*, at 689-693. It is hard to imagine a fact situation that so directly relates to rates as TWA's attempt here to prevent a broker from selling TWA tickets for cheaper than TWA chooses to sell them, and yet TWA did not hesitate to base its lawsuit there on state law claims.

3. Legislative history of the enactment of the pre-emption clause confirms that Congress did not intend to pre-empt state consumer protection laws.

Prior to enactment of the Airline Deregulation Act of 1978, there was no express pre-emption provision in the Federal Aviation Act. By adding 49 U.S.C. § 1305(a)(1), Congress sought to protect federal deregulation from state reregulation. In the section-by-section analysis of a precursor to the Airline Deregulation Act of 1978, the House Managers of the Bill stated:

> [W]ith the passage of legislation . . . loosening Federal regulation of airline services and fares, it is possible that some States will enact their own regulatory legislation, imposing utility type regulation on interstate airline service and fares. The Act includes a specific statutory provision precluding State interference with interstate service and fares.

123 CONG. REC. 30595 (1977).

Congress further expressed its concern that inconsistent state and federal economic regulation would result in "situations in which carriers have been required to charge different fares for passengers traveling between two cities, depending on whether these passengers were interstate passengers whose fares are regulated by the CAB, or intrastate passengers, whose fare is regulated by a State." H.R. Rep. No. 95-1211, 95th Cong., 2d. Sess., *reprinted in* 1978 U.S.C.C.A.N. 3737, 3751-3752. There are no references to pre-emption in either the Congressional Record or elsewhere in the various committee reports relating to the ADA that suggest that Congress

intended to pre-empt anything more than utility-type regulation.

Based on the legislative history, it is clear that Congress sought to protect the newly-deregulated airlines from state regulation that would interfere with the goals of economic deregulation of the air travel industry. It is impossible, however, to conclude that Congress intended to pre-empt state regulation of deceptive advertising.[11]

The saving clause was retained by Congress when it enacted the pre-emption clause. The Fifth Circuit placed full emphasis on the pre-emption clause and all but ignored the saving clause, on the

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11 In its attempt to divine Congressional intent, the court of appeals placed some reliance on subsequent legislative history. *Trans World Airlines, Inc. v. Mattox*, 897 F.2d 773, 777-778 (5th Cir. 1990), App. to Cert. Pet. at 20a-22a. This subsequent history related to the sunset of the CAB and transfer of some of its functions to DOT. Civil Aeronautics Board Sunset Act of 1984, Pub. L. No. 98-443, 98 Stat. 1703 (1984). Although the Sunset Act did not make material changes to either the preemption clause or the saving clause, the court of appeals nonetheless cited the House committee report's statement that "federal regulation insures a uniform system of regulation and preempts regulation by the states." *Trans World Airlines, Inc. v. Mattox*, 897 F.2d 773, 778 (5th Cir. 1990), App. to Cert. Pet. at 21a. The State believes that a better approach is that taken by the Fifth Circuit in *Rogers v. Frito-Lay, Inc.* 611 F.2d 1074, 1080 (5th Cir. 1980), *cert. denied* 449 U.S. 889 (1981), when it observed:

> The retroactive wisdom provided by the subsequent speech of a member of Congress stating that yesterday we meant something that we did not say is an ephemeral guide to history. . . . What happened after a statute was enacted may be history and it may come from members of the Congress, but it is not part of the legislative history of the original enactment.

apparent theory that the pre-emption clause was enacted more recently in time than the saving clause and therefore controlled. *See* App. to Cert. Pet. at 31a. For that reason, that court flatly ignored the Court's discussion of the effect of the saving clause in *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290 (1976). App. to Cert. Pet. at 31a. Admittedly, *Nader* was decided before Congress passed the Airline Deregulation Act of 1978, so the Court did not have before it the interplay between the two clauses, and the saving clause cannot be read to save the precise pre-emption that Congress enacted. But Congress' retention of the saving clause (as well as Section 411, the anti-deception clause) when it added the pre-emption clause must be given some meaning. The State believes that a fair conclusion is that Congress indeed only intended limited pre-emption of economic regulation and did not intend to take away from the states the concurrent anti-deception jurisdiction they had long enjoyed. The only reason to reject this logic is if the language of the FAA forces a conclusion that Congress intended to pre-empt the states from regulating deceptive advertising by airlines. It does not.

4. Texas law and federal law relating to deceptive airline practices are complementary and square with the principles of federalism.

The Texas law is congruent with federal law relating to airline practices. State enforcement of consumer protection laws as an aspect of state police powers has a long history. *See, e.g., Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963); *Friedman v. Rogers*, 440 U.S. 1 (1979). Consider, for example, the long history of joint and successful enforcement of state consumer protection laws and of Section 5 of the Federal Trade Commission Act, 15

U.S.C. § 45(a)(1). Section 5, by itself, does not preempt a state's authority to enforce its own law. *See American Financial Services v. F.T.C.*, 767 F.2d 957, 989 (D.C. Cir. 1985); *Katherine Gibbs School (Inc.) v. F.T.C.*, 612 F.2d 658, 667 (2d Cir. 1979); *Double-Eagle Lubricants, Inc. v. State of Texas*, 248 F. Supp. 515, 517 (N.D. Tex. 1965). In fact, the Federal Trade Commission encouraged development of state consumer protection laws because problems in the marketplace are beyond the enforcement capabilities of the federal government. D. PRIDGEN, CONSUMER PROTECTION AND THE LAW § 3.02[1].

The FAA has a prohibition against deceptive practices by airlines that is parallel to Texas law:

> The Board may, upon its own initiative or upon complaint by any air carrier, foreign air carrier, or ticket agent, if it considers that such action by it would be in the interest of the public, investigate and determine *whether any air carrier, foreign air carrier, or ticket agent has been or is engaged in unfair or deceptive practices* or unfair methods of competition in air transportation or the sale thereof. If the Board shall find, after notice and hearing, that such air carrier, foreign air carrier, or ticket agent is engaged in such unfair or deceptive practices or unfair methods of competition, it shall order such air carrier, foreign air carrier, or ticket agent to cease and desist from such practices or methods of competition.

49 U.S.C. § 1381(a) [emphasis added]. This section derives from Section 5 of the Federal Trade Commission Act, *Pan American World Airways, Inc. v. U.S.*, 371 U.S. 296, 303 (1963), and thus federal regu-

latory actions under this section should be construed according to the same federalist principles. It makes both good sense and good law.

This approach is confirmed by the one case of the Court to construe the FAA's anti-deception language. The Court held that Congress did not intend exclusive federal regulation of deceptive airline practices. *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290, 301 (1976). The Court concluded that Congress, in providing for federal regulation of unfair or deceptive practices, did not intend to immunize airlines from liability under state law.

> In sum, § 411 confers upon the [Civil Aeronautics] Board [now, the Department of Transportation] a new and powerful weapon against unfair and deceptive practices that injure the public. But it does not represent the only, or the best, response to all challenged carrier actions that result in private wrongs.

Nader v. Allegheny Airlines, Inc., 426 U.S. at 303.

In reaching this conclusion, the Court relied in particular on the FAA's saving clause, 49 U.S.C. § 1506. *Nader v. Allegheny Airlines, Inc.*, 426 U.S. at 300. The saving clause provides:

> Nothing contained in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies.

49 U.S.C. § 1506. The Court concluded that the FAA and a common-law-based private action for damages for overbooking were not "absolutely inconsistent" and could coexist. 426 U.S. at 300.

State consumer protection laws are fully consistent with the FAA's parallel provisions. When the Civil Aeronautics Board ("CAB") promulgated a regulation to implement the FAA's pre-emption clause, it did not prohibit state regulation of deceptive advertising. 14 C.F.R. § 399.110.

The CAB's analysis of its regulation indicates its conclusion that deceptive advertising regulation is not the type of regulation that Congress intended to pre-empt. In the comments accompanying its pre-emption regulation, the CAB discussed at length the kinds of state regulation pre-empted by the pre-emption clause. The CAB first stated that the states were clearly prohibited from directly regulating rates, routes and services. Statements of General Policy, Implementation of Preemption Provisions of the Airline Deregulation Act of 1978, 44 Fed. Reg. 9948, 9951 (1979). The CAB concluded that pre-emption extends to all of the economic factors that go into the *quid pro quo* for the passenger's fare. *Id*. The CAB also concluded that the scope of pre-emption extended beyond direct regulation of rates, routes and services to subjects such as regulation of capital structure, minimum insurance requirements, and bonding. Its rationale for including such regulations within the scope of pre-emption was that such regulations involved the balancing of various regulatory goals against the goal of free competition and that Congress had already decided to strike such balances in favor of competition. *Id*.

Application of the CAB's rationale to state regulation of deceptive airline advertising shows that state consumer protection laws do not fall within the

scope of pre-empted regulation.[12] State consumer protection laws such as the Texas statute at issue do not advance consumer protection at the expense of market-competition. Instead, they protect consumers by protecting the competitive functioning of the marketplace.

In fact, the current DOT regulation that applies to advertising of the type at issue herein is identical to the enforcement provision taken by Texas. The existing federal regulation provides:

> The [Civil Aeronautics Board, now DOT] considers any advertising or solicitation by a direct air carrier, indirect air carrier, or an agent of either, for passenger air transportation, a tour (*i.e.*, a combination of air transportation and ground accommodations), or a tour component (*e.g.*, a hotel stay) that states a price for such air transportation, tour, or tour component to be an unfair or deceptive practice, unless *the price stated is the entire price to be paid* by the customer to the air carrier, or agent for such air transportation, tour, or tour component.

14 C.F.R. § 399.84 [emphasis added].

The letters to the airlines that served as the airlines' pretext for initiating this action advised the air-

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12 Later, in 1984, the CAB expressed its opinion that the states are not preempted from regulating advertising. GENERAL ACCOUNTING OFFICE, REPORT TO THE CHAIR OF THE OVERSIGHT SUBCOMMITTEE OF THE HOUSE COMMITTEE ON PUBLIC WORKS AND TRANSPORTATION, GAO/RCED-84-154 (1984), Appendix I, page 7. (It should be noted that, according to this report, DOT stated that it believed that state regulation of deceptive airline practices was preempted.)

lines that their actions violated state law as well as federal law, and gave them the opportunity to cure their violations without being sued, although an opportunity to cure is not required by state law.

The type of deceptive advertising practices that resulted in the letters from Texas and the other states is exemplified by an advertisement placed by TWA, J.A. at 198a. The TWA advertisement, which was the subject of separate litigation between TWA and the State of New York, advertises "unbelievably low fares to London, or elsewhere in Europe," offering a roundtrip air ticket *and* hotel *and* rental car for only $298. J.A. at 199a. The $298 fares are not just "unbelievably low"—they are in fact nonexistent. The actual cost of the ticket itself is $321, after the surcharges hidden in the fine print at the bottom of the advertisement are added in. J.A. at 200a. The hotel segment actually requires that the consumer first *pay for three nights in a London hotel*, after which the consumer receives three nights *outside of London*. J.A. at 199a. The rental car, for a minimum seven-day stay, was at no additional charge for only three days, after which the consumer was required to pay a minimum of $17 per day, plus more surcharges and taxes. J.A. at 200a-201a.[13]

The exact nature of these hidden surcharges is telling, as well. Of the total amount of surcharges, more than half ($13) derived from federally-imposed taxes and fees, J.A. at 200a-201a, but an additional $10 is a so-called "security surcharge" that is no more than an increased cost of doing business, which the

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13 For a detailed description of the facts surrounding this TWA advertisement, *see New York ex rel. Abrams v. Trans World Airlines, Inc.*, 728 F.Supp. 162, 167 (S.D.N.Y. 1990).

airlines chose to factor out of the actual fare. *See* Affidavit of John M. Bloodworth, Vice President of Advertising and Marketing for Pan Am, J.A. at 179a-180a. There is no rationale for the exclusion of this amount from the full fare, except to keep the fare artificially low.

Therefore, the states wrote to the airlines. For example, the November 14, 1988, letter to Pan Am reads, in pertinent part:

> It is the position of the states [of California, Massachusetts, New York, Texas, and Washington] that any fuel, tax or other surcharge to a fare must be included in the total advertised price of the fare. Failure to do so violates our respective state consumer protection laws.
>
> Specific surcharges which must be included in the advertised fare are
>
> - the $3.00 international departure fee,
> - the $10.00 customs fee,
> - the "security" surcharge (usually $10.00), and
> - any fuel surcharge.
>
> It is no defense to claim that the surcharges are disclosed elsewhere in the advertisement. The deception, and thus the violation of our laws, occurs when the advertisement states a specific amount for a fare which is not in fact the true cost because the surcharges have been factored out. This deception cannot be cured by a footnote or other separate reference.

> The states do not wish to burden airlines unduly with respect to advertising their fares. Full disclosure in this instance is actually simpler—no footnote is required and there is therefore less "clutter" in the advertisement.
>
> More importantly, our citizens—and your customers—will not be deceived by this information.

J.A. at 185a-186a.

That letter also discussed the existing federal regulation, 14 C.F.R. § 399.84, and the fact that its requirements were parallel to the requirements of state law. J.A. at 186a-187a. The letter to Pan Am, and similar ones to TWA, Continental, British Airways, and Lufthansa (no state ever contacted the other carriers that intervened in this action), went on to discuss the interplay between DOT activity and state activity, as well as the states' position that they were not pre-empted from stopping deceptive advertising. J.A. at 187a. Rather than take advantage of the informal resolution offered by this letter, the airlines chose to initiate this litigation.[14]

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14 And they are still at it. Attached to this Brief as an Appendix is a copy of a recent advertisement for TWA that appeared in *The New Yorker* (December 16, 1991). The advertised fare is $416 from New York to Israel. In fact, the fare is $875—the $416 is one-way only (but a round-trip purchase is required), and TWA continues to delete from the advertised fare a number of surcharges, this time totalling $43 (significantly above the $23 TWA was excluding from the fare when it filed this action in 1988), from the advertised fare.

One of the issues raised in those letters was the apparent attempt by DOT to circumvent the existing federal regulation relating to surcharges, an attempt that was ultimately unsuccessful. DOT has consistently sided with the airline respondents in opposing state regulation of airline advertising and by permitting the exact practices which the state would prohibit. J.A. at 127a.

In *Alaska v. U.S. Department of Transportation*, 868 F.2d 441 (D.C. Cir. 1989), the court held that DOT had acted unlawfully in adopting orders that were designed to circumvent the existing regulation, 14 C.F.R. § 399.84, without actually amending it. The court recognized that the existing regulation prohibited separate listing of surcharges. *Id.* at 444. Because DOT's orders, which would have made formal DOT's policy not to enforce the existing regulation, were not adopted in keeping with the notice-and-comment procedures required by the Administrative Procedure Act, the court invalidated them, leaving the regulation as the existing federal law on the matter. *Id.* at 441.[15]

Thus, Texas law and federal law and regulation remain in twain. The mere fact that Texas may impose liability over and above federal law is no basis for a court to find pre-emption. *English v. General Electric* Co., 110 S.Ct. 2270, 2280 (1990) (*quoting California v. ARC America Corp.*, 109 S.Ct. 1661, 1667

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15 After losing in this effort, DOT republished a formal Notice of Proposed Rulemaking that would amend Section 399.84 to permit, *inter alia*, excluding certain surcharges from the advertised fare. 54 Fed. Reg. 31052 (July 26, 1989). As of late 1991, no final action had been taken on this proposed rule, nor had DOT set a date for such final action. 56 Fed. Reg. 53614 (October 21, 1991).

(1989)). Nor is the fact that compliance with state consumer protection laws might seem a burden to an airline that desires to compete unfettered by rules of conduct. *See Ingersoll-Rand Co. v. McClendon*, 111 S.Ct. 478, 483 (1990).

5. Except for this case, court interpretations of FAA pre-emption of state regulation of deceptive airline practices are consistent in opposing pre-emption.

Court constructions of the pre-emptive effect of the FAA, as applied to a variety of practices and state laws, vary widely depending on the facts of the case and the state laws involved. However, with respect to state consumer protection laws, such as the Texas law involved here, there is an island of agreement in an otherwise turbulent sea of dispute.

In *West v. Northwest Airlines, Inc.*, 923 F.2d 657 (9th Cir. 1991), *petition for cert. filed*, No. 91-505, the Ninth Circuit held that Section 105 of the Federal Aviation Act pre-empts claims based on state law ". . . only when the underlying statute or regulation itself relates to airline services, regardless of whether the claim arises from a factual setting involving airline services. Thus, state laws that merely have an *effect* on airline services are not preempted." 923 F.2d at 660 [emphasis in original].

The Ninth Circuit does not discuss the Fifth Circuit's opinion in this case. It does, however, cite *New York ex rel. Abrams v. Trans World Airlines, Inc.*, 728 F.Supp. 162 (S.D.N.Y. 1990). The district court there was aware of the district court's holding in this case and did not follow it. *Id.*; 728 F.Supp. at 166-167. The court drew a distinction between regulation of rates, routes, and services, and regulation of deceptive advertising.

> [A]ny relationship between New York's enforcement of its laws against deceptive advertising and Pan Am's rates, routes, and services is remote and indirect. In challenging Pan Am's advertising, New York does not care how much Pan Am charges, where it flies, or what amenities it provides its passengers. Its sole concern is with the manner in which Pan Am advertises those matters to New York consumers. Thus, as far as New York is concerned, Pan Am is free to charge $200 or $2000 for a flight from LaGuardia to London, but it cannot take out a full-page newspaper advertisement telling consumers the fare is $200 if it is in fact $2000. Similarly, Pan Am remains free to route a plane from Ithaca to Istanbul with as many stops in between as it chooses, but it cannot market that flight to New York consumers as a "direct" flight.

New York ex rel. Abrams v. Trans World Airlines, Inc., 728 F.Supp. 162, 176 (S.D.N.Y. 1990).[16] The dis-

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16 This opinion involved three cases: New York's separate suits against TWA and Pan Am for deceptive advertising (initially filed in New York State court, and removed to federal court by TWA and Pan Am) and Pan Am's suit against New York (initially filed in federal court). The district court remanded to state court New York's suits against TWA and Pan Am and dismissed most of Pan Am's affirmative claims in the original action. Pan Am subsequently dismissed that action and the state court denied New York the relief it sought, finding that New York was collaterally estopped from relitigating the issue whether the advertisements were deceptive because of the Fifth Circuit's decision that such actions were preempted by federal

trict court has perfectly summarized the approach to regulation taken by the State of Texas in this case. Texas does not contest the right of an airline to determine its own rates, routes, and services, but only the ability of an airline to lie to Texans about what rates, routes, and services it has decided to offer.

Another federal district court took a similar approach, in a case involving a private suit under a state consumer protection law. In *Brunwasser v. Trans World Airlines, Inc.*, 541 F. Supp. 1338 (W.D. Pa. 1982), a consumer alleged that a TWA advertisement for a special non-stop Pittsburgh to London fare was deceptive and misleading. *Id.* at 1347. The court held that this cause of action was not pre-empted, but preserved by the saving clause. *Id.* at 1345. Here, too, the analysis is consistent.

The only state court case relating to application of state deceptive advertising laws to airline practices reached the same conclusion. In *People v. Western Airlines, Inc.*, 155 Cal. App. 3d 597, 600, 202 Cal. Rptr. 237 (Cal. App. 1984), *appeal denied* (Cal. Sup. 1984), *cert. denied*, 469 U.S. 1132 (1985), the California court of appeals considered the effect of the pre-emption clause and concluded that state regulation of an airline's manner of advertising rates and services was not within the ambit of the pre-emption clause. *Id.*

In the only case that might appear to give some credence to the case for pre-emption of state regulation of deceptive advertising, the Seventh Circuit held that the FAA does pre-empt Illinois' consumer protection law to the extent that the law would require an "air carrier to deal with a would-be agent

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law. *New York ex rel. Abrams v. Trans World Airlines, Inc'*, 575 N.Y.S.2d 1 (App. Div. 1991).

who refuses to respect a contract restricting advertising of discount prices." *Illinois Corporate Travel, Inc. v. American Airlines, Inc.*, 889 F.2d 751, 755 (7th Cir. 1989), *cert. denied*, 110 S.Ct. 1948 (1990). However, that court took care to clarify that its ruling did not touch on the "extent to which state laws may control deceptive advertising, require disclosures, or enforce (as opposed to upset) contracts between carriers and agents." *Id.* at 755. In an earlier decision of that circuit written by Judge Easterbrook, the author of the opinion in *Illinois Corporate Travel*, the court had said, in dictum, that common law remedies are available in cases of fraud by airlines, citing to *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290 (1976), discussed above. *Bieneman v. City of Chicago*, 864 F.2d 463, 471 (7th Cir. 1988). It therefore appears likely that, if the Seventh Circuit were to address the issue directly, it would rule in favor of state regulation of deceptive advertising and against pre-emption.

Although courts have been uniform in refusing to pre-empt state regulation of deceptive advertising by airlines, the same cannot be said of other types of cases involving pre-emption by the FAA.

Perhaps the most perplexing opinion is one pending before the Court, *Federal Express Corp. v. California Public Utilities Comm'n*, 936 F.2d 1075 (9th Cir. 1991), *petition for cert. filed*, No. 91-502. In that case, in apparent full conflict with its earlier decision in *West v. Northwest Airlines, Inc.*, 923 F.2d 657 (9th Cir. 1990), *petition for cert. filed*, No. 91-505, the Ninth Circuit held that the pre-emption clause prevented state regulation of the rates, routes, and services of Federal Express's intrastate trucking activities, which Federal Express chose to conduct as part of its package delivery system. *Id.* at 1078. The court dis-

tinguished *Federal Express* from *West* by saying that the former involved regulation of an integrated air-cargo system, which Congress specifically intended to encourage and protect from state regulation, but that the latter involved regulation relating to the field of contract. *Id.* at 1078-1079. This distinction does not appear to be warranted by the general rules relating to pre-emption, established by the Court and discussed above.

Other reported cases evince a similar confusion of analysis and differing results. *See, e.g., French v. Pan Am Express, Inc.*, 869 F.2d 1 (1st Cir. 1989); *O'Carroll v. American Airlines, Inc.*, 863 F.2d 11, 13 (5th Cir. 1989); *Anderson v. USAir, Inc.*, 818 F.2d 49, 57 (D.C. Cir. 1987); *Air Transport Ass'n of America v. Public Utilities Commission of California*, 833 F.2d 200, 207 (9th Cir. 1987), *cert. denied*, 108 S.Ct. 2904 (1988); *Hingson v. Pacific Southwest Airlines*, 743 F.2d 1408, 1415 (9th Cir. 1984); and *In re Air Crash Disaster at John F. Kennedy International Airport on June 24, 1975*, 635 F.2d 67, 74 (2d Cir. 1980).

6. ERISA is not a proper analogue.

The Fifth Circuit placed great weight on the similarity of the pre-emption clause in the FAA to the pre-emption clause in the Employee Retirement Income Security Act of 1974 ("ERISA"). *Trans World Airlines, Inc. v. Mattox*, 897 F.2d 773, 780 (5th Cir. 1990), App. to Cert. Pet. at 25a. The prime underpinning of the limitless reading it gave the "relating to" language of the FAA is the broad reading given by the Court to similar language in ERISA. That reliance is misplaced, for ERISA is not an analogous law.

ERISA is a comprehensive statute which Congress adopted after a careful study of private retirement pension plans. *Ingersoll-Rand Co. v. McClendon*, 111 S.Ct. 478, 482 (1990); *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 510 (1981). ERISA marked the decision of Congress to enact broad-based federal regulation of pension plans. The Airline Deregulation Act of 1978, on the other hand, marked only limited deregulation of what had been a highly-regulated industry. As it relates to false advertising and consumer protection, as opposed to utility-type ratemaking, the FAA is not at all comprehensive.

Beyond that, the pre-empting provisions of ERISA "perhaps are not a model of legislative drafting." *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 739 (1985). Therefore, reference to ERISA's broadly-pre-emptive effect, based solely on the similarity of two words, ignores both the flaws of the ERISA language and its fundamental difference from the FAA.

ERISA pre-emption is not sweeping because of its "relates to" language; rather, that "relates to" lan-

guage is read broadly because of the wide and inclusive sweep of the comprehensive ERISA scheme. *Ingersoll-Rand Co. v. McClendon*, 111 S.Ct. 478, 482 (1990). No such sweep exists in the FAA Act, nor should the Court strain to find one.

But perhaps the best argument against a rote, word-for-word comparison of ERISA's broad pre-emption clause to the pre-emption clause of the FAA is made by a comparison of the different pre-emptive schemes of the two laws.

The scope of ERISA pre-emption is dependent on three separate sections of that law: (1) the pre-emption clause itself, 29 U.S.C. § 514(a), (2) the saving clause, 29 U.S.C. § 1144(b)(2)(A), and (3) the deemer clause, 29 U.S.C. § 1144(b)(2)(B). FAA pre-emption, on the other hand, is governed by only two sections of that law: (1) the pre-emption clause, 49 U.S.C. § 1305(a)(1), and (2) the saving clause, 49 U.S.C. § 1506. These respective clauses operate as follows:

ERISA	Federal Aviation Act
Pre-emption clause Except as provided in the saving clause, ERISA supersedes any and all State laws "insofar as they may now or hereafter relate to any employee benefit plan." 29 U.S.C. § 514(a)	**Pre-emption clause** FAA pre-empts any State law "relating to rates, routes, or services of any air carrier." 49 U.S.C. § 1305(a)(1)
Saving clause Except as in the deemer, nothing in ERISA "shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities." 29 U.S.C. § 1144(b)(2)(A)	**Saving clause** Nothing in the FAA "shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies." 49 U.S.C. § 1506
Deemer clause No employee benefit plan "shall be deemed . . . to be engaged in the business of insurance or banking for purposes of any law of any State purporting to regulate insurance companies, insurance contracts, banks, trust companies, or investment companies." 29 U.S.C. § 1144(b)(2)(B)	**Deemer clause** [None]

The wording of the pre-emption clauses in both ERISA and the FAA is in fact similar. After that, however, the similarity ceases. The saving clause of ERISA reserves to the States only those laws that regulate insurance, banking, and securities, subject to the deemer clause. In the FAA, on the other hand, Congress reserved to the States *all remedies* provided by common law or statute. Many of the Court's decisions on ERISA pre-emption turn on the question of whether State laws indeed regulate insurance, banking, and securities and thus come within the initial scope of the saving clause. *See, e.g., FMC Corp. v. Holliday*, 111 S.Ct. 403, 409 (1990).

Furthermore, unlike ERISA, the FAA has no deemer clause to diminish the effect of its savings clause. And it is in that distinction that the greatest difference lies. What the ERISA saving clause seemingly reserved to the states, the deemer clause partially pulls back to exclusively federal regulation. For example, although an insured employee benefit plan is subject to indirect state regulation to the extent that the state regulates the insurance company, a self-funded employee benefit plan is not to be deemed as in the business of insurance and is therefore not subject to state regulation. *FMC Corp. v. Holliday*, 111 S.Ct. 403, 409 (1990).

The FAA does not in any way similarly diminish its own saving clause. The Fifth Circuit failed to include the proper effect of the saving clause in its construction of the pre-emption clause.

As a simple matter of reading the statutes, it is clear that ERISA is not a fit model for construing the pre-emptive effect of the FAA.

CONCLUSION

For the reasons stated, the judgments of the courts below should be reversed.

Respectfully submitted,

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APPENDIX

TWA Advertisement

The New Yorker

December 16, 1991

Advertising Insert, unpaginated

[Reduced 70% from original. Full text printed following reproduction of advertisement.]

FLY TO ISRAEL ON TWA AND SAVE MORE THAN FOND MEMORIES.

$416
Each way based on roundtrip purchase. Service from JFK Int'l.

Save on your airfare. Save on your hotel accommodations. Save on your car rentals. Savings you can only get with a TWA roundtrip ticket to Israel.

TWA makes it convenient to visit Israel with direct service to Tel Aviv. You'll arrive rested and ready to visit the Western Wall of Jerusalem's Old City, the Walls of Jericho. Eager to explore the marine wonders beneath the Red Sea, historical Masada and all the pleasures Israel has to offer.

GREAT SAVINGS ON DELUXE MORIAH HOTEL ACCOMMODATIONS.

Stay at the deluxe and centrally located Moriah Jerusalem, the Moriah Plaza Tel Aviv, or the Moriah Plaza Tiberias for 8 nights (using at least 2 of the 3 hotels), and you'll receive this low rate now thru February 29, 1992. Just call Moriah Hotels at *1-800-221-0203* or, in New York, *212-541-5009* and be sure to ask for the TWA/Moriah Hotels Great Savings Program.

DELIGHTFUL SAVINGS ON EXCLUSIVE TWA/ELDAN CAR RENTALS.

Drive to Tel Aviv or Jerusalem on Israel's super highway, enjoy a leisurely trip to the famous resort of Elat, stopping at your leisure along the coast — Eldan, Israel's largest car rental company, offers you exclusive low prices when you fly roundtrip on TWA.

With a branch conveniently located at Israel's Ben-Gurion International Airport, and thirteen additional offices around the country, Eldan has just the right car for your family or business needs from its fleet of 2100 vehicles. Reserve in advance in the U.S. and Canada by calling *1-800-531-8778* or, in New York, *212-629-6090*.

Historical Israel never looked better. TWA's low fares and hotel and car rental deals make this the perfect time to enjoy all the pleasures of Israel. For reservations call your Travel Agent or TWA at *1-800-892-4141*.

MORIAH HOTELS

DELUXE HOTELS
From $29.50 Per person, per night, double occupancy

CAR RENTAL
From $175.00 Per week, Unlimited Mileage

eldan RENT-A-CAR אלדן השכרת רכב

TWA
FIND OUT HOW GOOD WE REALLY ARE.

FARE CONDITIONS: Fare featured is each way based on roundtrip purchase, is non-refundable, is valid for travel effective now thru 3/31/92. Fare is higher 12/16-12/24/91. Fare is subject to change and governmental approval. Change of itinerary penalty applies. 14 day advance purchase required. Minimum stay required is 6 days, maximum stay allowed is 21 days. Seats are limited and may not be available on all flights or days of week. $28 fee for customs/immigration/agriculture, security surcharge and U.S. departure tax not included. $15 Israel departure tax not included. Passengers are to ID, International Airport. Moriah Hotels: Rate shown is per person, based on double occupancy and does not include 15% service charge. Minimum stay is 8 nights, ordering at least two of the Israel properties mentioned. Rates valid now through 2/29/92. Peak season supplement of $8 per person applies 12/20/91-1/5/92. All reservations are subject to availability. Eldan: Price excludes optional LDW and CDW (full standard drivers qualifications apply). Rates valid now thru 3/31/92 except for holiday period 12/12/91-1/5/92 when higher rate applies.

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[Text of advertisement on preceding page.]

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Supreme Court, U.S.
FILED
JAN 10 1992
OFFICE OF THE CLERK

No. 90 - 1604

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1991

DAN MORALES,
ATTORNEY GENERAL OF TEXAS,

Petitioner,

v.

TRANS WORLD AIRLINES, INC.,
et al.,

Respondents.

On Writ of Certiorari
To the United States Court of Appeals
For the Fifth Circuit

BRIEF OF THIRTY-ONE STATE ATTORNEYS GENERAL RESPONDENTS IN SUPPORT OF PETITIONER, DAN MORALES

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Petitioner,

v.

TRANS WORLD AIRLINES, INC.,
et al.,

Respondents.

**On Writ of Certiorari
To the United States Court of Appeals
For the Fifth Circuit**

BRIEF OF THIRTY-ONE STATE ATTORNEYS GENERAL RESPONDENTS IN SUPPORT OF PETITIONER, DAN MORALES

INTRODUCTION

The Attorneys General of the States and Commonwealths of Alaska, Arizona, California, Colorado, Connecticut, Florida, Idaho, Illinois, Iowa, Kansas, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, Nevada, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Rhode Island, South Dakota, Tennessee, Vermont, Washington, West Virginia,

Wisconsin and Wyoming ("the States"), who are filing this brief as respondents in support of the Brief of the Petitioner, Dan Morales, Attorney General of Texas, strongly urge this Court to overturn the permanent injunction issued by the court below.[1/] This unprecedented order disregards fundamental principles of federalism and disrupts the States' traditional exercise of their police powers by preventing their enforcement of their laws prohibiting deceptive advertising. By sustaining the district court's Final Judgment, the Fifth Circuit has elevated a single industry -- the airline industry -- to a sacrosanct pedestal where it may operate above state law. By its order the district court enjoined the States from:

> "initiating any enforcement action . . . which would seek to regulate or restrict any aspect of . . . airlines' air fare advertising or their other operations involving their rates, routes and/or services."

District Court Final Judgment.

This obliteration of the States' exercise of their longstanding police powers was accomplished by the court

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1. In addition to the importance of this Court's overturning the Final Judgment of the District Court on the merits, these filing States stress the importance of this Court reversing the district court's finding of jurisdiction over all of the enjoined State Attorneys General save the Texas Attorney General. Thus the States respectfully request that this Court, after deciding the breadth of the preemption clause contained in the Federal Aviation Act, grant the *petition for cert. pending* in No. 90 - 1606, and then, as the Solicitor General's *amicus curiae* brief on the petition for *writ of certiorari* urged, summarily reverse the district court's finding that it had jurisdiction over thirty-three State Attorneys General who had only appeared specially before that court to contest its jurisdiction over them.

below without any consideration of the legislative history or context within which section 105 (a) (1) of the Airline Deregulation Act of 1978 ("ADA;" Pub. L. No. 95-504, 92 Stat. 1705; 49 U.S.C. § 1305 (a) (1)) appears. Rather the court below, in conflict with well-settled preemption analysis, interpreted the words "relating to" in §105 (a) (1) so broadly as to lead to the implausible, yet implicit, conclusion that everything an airline does, from advertising deceptively to running an illegal lottery within any of our States to spur sales of airline tickets, is exempt from compliance with the laws of the state in which such activity occurs.

The court's order and its reasoning are wrong. This Brief of Thirty-one Attorneys General Respondents[2/], as well as the Brief of Petitioner, Dan Morales, the Attorney General of the State of Texas, explain the error of the decision of the court below.

SUMMARY OF ARGUMENT

The Fifth Circuit erred in holding that the Federal Aviation Act of 1958 ("FAA;" Pub. L. No. 85-726, 72 Stat. 737; 49 U.S.C. § 1301 *et seq.*) and the Airline Deregulation Act show an express Congressional intent to preempt state enforcement of state laws which prohibit false advertising when airlines engage in false advertising within a particular state.

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2. These thirty-one State Attorneys General, who are deemed respondents pursuant to Rule 19.6 of this Court because, although parties to the case *sub judice* and subject to the order of the district court, they were not petitioners in Petition for Writ of Certiorari No. 90-1604, adopt herein by this reference the Question Presented, Opinions Below, Jurisdiction, Statutes Involved and Statement of the Case sections as set forth in the Brief on the Merits of the Petitioner, Dan Morales, Attorney General of Texas.

1. The Fifth Circuit decision contravenes the bedrock standard this Court has enunciated repeatedly: in areas where there is a long-standing traditional exercise of the states' police powers, preemption can be found only where Congress has made its intent clear and manifest. *See, e.g., Wisconsin Public Intervenor v. Mortier,* 501 U.S. ___, 115 L.Ed.2d 532, 543 (1991) and *California v. ARC America Corp.,* 490 U.S. 93, 101 (1989). Since consumer protection is an area traditionally within the exercise of the states' police power, to find preemption in a case such as the one *sub judice* requires an even clearer statement from Congress than is required in a typical preemption case. No such expression, clear or otherwise, of Congressional intent can be found in the FAA, the ADA or their legislative history. The Fifth Circuit decision upholding the actions of the district court is not only wrong on the question of preemption, but in one fell-swoop it turned the notion of limitations on federal court jurisdiction on its ear by also incorrectly deciding that the District Court for the Western District of Texas, Austin Division, could prevent, in addition to the Texas Attorney General, thirty-three other State Attorneys General, over whom the District Court clearly had no personal jurisdiction, from enforcing their respective state deceptive practices laws. To correct this egregious error, which even more directly goes to the heart of our federal system and the need to protect states' sovereignty within that federal system (*see, e.g., Gregory v. Ashcroft*, 501 U.S. ___, 115 L.Ed.2d 410, 421-423 (1991)), these filing states, again, respectfully request that this Court grant the pending *petition for writ of certiorari* in number 90 - 1606, and then as the Solicitor General advocated in his *amicus curiae* brief on the *petition for writ of certiorari*, summarily reverse the district court's improper exercise of jurisdiction over thirty-three State Attorneys General who had only appeared specially before that court to contest its jurisdiction over them.

2. Federal regulation of deceptive advertising emanates from § 411 of the FAA (49 U.S.C. § 1381). As first adopted in 1938, it was patterned after § 5 of the Federal Trade Commission Act, 15 U.S.C. § 45. *See Pan American World Airways, Inc. v. United States*, 371 U.S. 296 (1963). The FTC Act's § 5 has been interpreted historically as coexisting with state laws regulating false advertising and deceptive business practices. *See, e.g., American Financial Services v. FTC*, 767 F.2d 957 (D.C. Cir. 1985). Likewise, from its inception, § 411 has been read to supplement, not preempt, state statutory and common law causes of action used to challenge airline deceptive practices. *See, e.g., Brunwasser v. Trans World Airlines, Inc.*, 541 F.Supp. 1338 (W.D. Pa. 1982); *People v. Western Airlines, Inc.*, 155 Cal. App.3d 597 (1984), *cert. denied sub nom. California v. Western Airlines,* 469 U.S. 1132 (1985); and, *State (of New York) by Lefkowitz v. Scottish-American Ass'n, Inc.,* 52 A.D.2d 528 (1st Dept. 1976). Further, this Court has interpreted the "savings clause" of the FAA, which is found at § 1106 (49 U.S.C. § 1506), as preserving state causes of action which, on the federal level, could be challenged under § 411. *See Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290, 303 (1976).

3. Section 105 (a)(1) of the FAA as added by the ADA only preempts state laws "relating to rates, routes, or services" of airlines. The Congressional history surrounding the addition of § 105 to the FAA makes it clear that Congress' intent was to prevent states from adopting utility type regulations which would require airlines to charge certain prices for certain flights, fly specified routes and provide specified air transportation services. Nowhere in any Congressional report or in the legislation itself is there mention of the need to change the historic regulation of deceptive advertising from an activity which permits both a state and federal presence to one which excludes the states.

4. For the same reasons that it is difficult to find in either the FAA or the ADA a "clear and manifest" statement of Congress' intent to preempt states from enforcing their false advertising laws against deceptive advertisements by airlines, there is nothing to support a finding of preemption, either by implication or because of a conflict between state deceptive advertising laws and federal law. Any relationship between airlines' "rates, routes or services" and the states' enforcement of their false advertising and deceptive practices laws against false advertising by airlines is too remote and indirect to fall within Congress' intent to prevent the adoption of utility type regulation by the states when it adopted § 105.

Accordingly, these thirty-one state attorneys general urge this Court to reverse the decision of the Fifth Circuit and the district court and rule that neither the FAA nor the ADA preempt state enforcement of state false and deceptive advertising laws against false and deceptive airline advertisements which appear in their states.

ARGUMENT

NEITHER THE FEDERAL AVIATION ACT OF 1958 NOR THE AIRLINE DEREGULATION ACT PREEMPTS STATE ENFORCEMENT OF STATE FALSE ADVERTISING AND DECEPTIVE PRACTICES LAWS AGAINST FALSE ADVERTISING BY AIRLINES

Price competition in the airline industry over the past decade has led some airlines to publish misleading advertisements offering fictitious ticket prices which

represent only a portion of the actual airfare one must pay to purchase the advertised ticket. Hidden in fine print, often at the bottom of the advertisements, are additional conditions and charges -- the advertised one-way fare is only available on a round trip purchase and customs and immigration fees, an international departure tax, and security surcharges are not included in the advertised price. Because these additional fees are not even included in the advertised "one way" price, which is available only on a round trip purchase, even a consumer who doubles the advertised one way fare to compute the cost of a round trip ticket will later be surprised to learn that the total cost of the ticket is higher yet. Nowhere in the advertisements is the total ticket price disclosed. *See People of the State of New York v. Trans World Airlines*, 728 F.Supp. 162, 167-168 (1989), wherein the court provides examples of the types of deceptive advertising which the states believe airlines cannot foist with impunity upon the citizens of their states. This advertising practice is an obvious attempt to deceive or mislead consumers into believing that an advertised airfare is less expensive than it really is.

It is widely agreed that the protection of consumers from unfair and fraudulent business practices is an area traditionally regulated by the states under their police powers. *See California v. ARC America Corp.*, 490 U.S. 93, 101 (1989); *Puerto Rico Department of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495 (1988); *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707 (1985); *Florida Lime & Avocado Growers v. Paul*, 373 U.S. 132 (1963); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); *Automobile Importers of Americ et al. v. State of Minnesota*, 871 F.2d 717 (8th Cir. 1989); and *Chrysler Corp. v. Texas Motor Vehicle Comm.*, 755 F.2d 1192, 1205 (5th Cir. 1985).

The states generally exercise this power to protect consumers through statutes which proscribe fraudulent or deceptive business practices. In this action, the airlines claim that the states are preempted by the Federal Aviation Act from protecting consumers against false and misleading airline advertisements that violate state deceptive practices laws. In assessing such a claim, courts begin with the assumption that "Congress did not intend to displace state law." *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981), and *see Wisconsin Public Intervenor v. Mortier, supra*, 115 L.Ed.2d at 543. Thus, state regulation is not preempted absent clear congressional intent to do so. *Wardair Canada, Inc. v. Florida Dept. of Revenue*, 477 U.S. 1, 6 (1986).

For state regulation to be preempted, there must be 1) an express congressional statement of an intent to preempt, 2) a clear indication that Congress intends to occupy the entire regulatory field or 3) a conflict between federal and state law which is impossible to resolve or in which state law stands as an obstacle to the accomplishment of the full objectives of Congress. *See Wisconsin Public Intervenor v. Mortier, supra,* 115 L.Ed.2d at 542 -543; *California v. ARC America Corp., supra,* 490 U. S. at 101; *Silkwood v. Kerr*, 464 U.S. 238, 248 (1984).

In addition, the airlines here must overcome the strong presumption against finding preemption of state law in an area – such as consumer protection against deceptive advertising – traditionally regulated by the states. *See California v. ARC America Corp., supra*, 490 U.S. at 101; *Hillsborough County v. Automated Medical Laboratories, Inc., supra*, 471 U.S. at 716. When it is claimed that Congress has preempted a field which has traditionally been occupied by the States, this Court has stated, "'we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act

unless that was the clear and manifest purpose of Congress.'" *Wisconsin Public Intervenor v. Mortier, supra,* 115 L.Ed.2d at 543 *quoting Rice v. Santa Fe Elevator Corp., supra*, 331 U.S. at 230. As stated by this Court, the reason for such caution is that the ability to use the Supremacy Clause (US Constitution, Article VI) to tip the balance of power toward the federal government and away from state governments "is an extraordinary power in a federalist system. It is a power that we must assume Congress does not exercise lightly." *Gregory v. Ashcroft, supra*, 115 L.Ed.2d at 423.

Thus, only an unambiguous congressional mandate would justify a finding of federal preemption of state regulation of deceptive airline advertising practices. No such unambiguous mandate is present here.

1. The Federal Aviation Act Does Not Expressly Preempt The States From Regulating Deceptive Airline Advertisements

Congress adopted the first regulation of the airline industry in 1938, when it adopted the Civil Aeronautics Act of 1938, 52 Stat. 973. Twenty years later Congress enacted the Federal Aviation Act of 1958. Both of these acts governed the airline industry through the use of anti-competitive federal regulations intended to nurture its early development. Under these regulations, the Civil Aeronautics Board ("CAB") repeatedly denied applications for new routes and discouraged experimentation with discount fares. *See* 1978 U.S. CODE CONG. & AD. NEWS 3737-3738. During this period advertising as well as other practices by the airline industry were required to

comply with both federal and state legal requirements. *See Nader v. Allegheny Airlines,* 426 U.S. 290 (1976).

In 1978, Congress concluded that the airline industry would be governed more effectively by market forces than by the CAB. Accordingly, it enacted the Airline Deregulation Act of 1978, as an amendment to the FAA. The ADA eliminated many of the regulations which had restricted competition among airlines. It liberalized entry into the industry, significantly reduced the CAB's authority to regulate rates and reduced access to anti-trust exemptions. *See* Freeman, *State Regulation of Airlines and the Airline Deregulation Act of 1978,* 44 J. AIR L. & COM. 747, 754 (1979).

Since Congress was about to eliminate tight economic regulation of the airline industry by the federal government, it was concerned that "some states will enact their own restrictive regulatory legislation, imposing utility-type regulation on interstate airline service and fares" and thus included within the proposed legislation "a specific statutory provision precluding state interference with interstate service and fares." 123 CONG REC. 30595 (Sept. 23, 1977). To ensure that the states did not undermine the federal government's deregulation efforts, Congress in 1978 included in the ADA what is now § 105 (a) (1) which provides that:

> "[N]o State...shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes or services of any air carrier having authority under subchapter IV of this chapter to provide air transportation."

49 U.S.C. § 1305 (a) (1).

In 1984, the Civil Aeronautics Board Sunset Act ("Sunset Act;" Pub. L. No. 98-443, 98 Stat. 1703; 49 U.S.C. §1551) was enacted. Although it transferred administrative responsibilities from the CAB to the Department of Transportation ("DOT"), and was passed following court decisions which found no preemptive effect on state consumer protection laws by the adoption of § 105 (*see, e.g., Brunwasser v. Trans World Airlines, Inc.*, 541 F.Supp. 1338 (W.D. Pa. 1982) and *People v. Western Airlines, Inc.*, 155 Cal. App.3d 597 (1984), *cert. denied sub nom. California v. Western Airlines,* 469 U.S. 1132 (1985)), Congress expressed no need to expand the scope of § 105's preemption language or effect and therefore did not substantively amend § 105 when it adopted the Sunset Act.

Thus, the question becomes whether Congress intended to preempt state deceptive practices statutes when it originally adopted § 105 of the ADA in 1978. An analysis of Congressional intent clearly shows that the phrase "relating to rates" does not, and was not meant to, preempt the states from regulating the truthfulness with which airlines advertise their rates. The phrase only prohibits the states from regulating the prices which airlines charge.

In enacting the ADA, Congress concluded that governmental rate setting of airfares -- whether state or federal -- does not best serve the public interest and that rates should be determined by the forces of a free marketplace. Aside from these economic conclusions, Congress was concerned that inconsistent state and federal air fare regulations or tariffs would result in "situations in which carriers have been required to charge different fares for passengers traveling between two cities, depending on whether these passengers were interstate passengers whose fares are regulated by the CAB, or intrastate passengers, whose fare is regulated by a State." H.R. Rep. No. 95-

1211, 95th Cong., *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 3737, 3751-3752.

Section 105 reflects these concerns. It preempts the states from controlling airline ticket prices. General state proscriptions against false advertising, however, do not impinge upon these Congressional concerns about conflicting rate requirements. In fact, state laws against false advertising promote the Congressional purpose. False price advertising distorts the free market by allowing companies with higher prices to steal business from honestly advertising competitors with lower (or the same) prices because the false advertisements create the incorrect perception that the higher priced advertiser's prices are lower when in fact they are not. False advertisements thus distort the free market forces Congress tried to establish as the regulatory mechanism of airline rates and accordingly they directly conflict with Congressional goals.

Far from impeding Congressional goals, the states by enforcing their laws against deceptive price advertisements are furthering the goal of permitting the market place to set rates. State false advertising laws merely mean that an airline cannot fraudulently induce a prospective customer to purchase its tickets in the belief that the price which the customer is to pay is, in fact, lower than it really is. The states are requiring nothing more than that the airlines, like any other seller trying to make a sale, provide full and accurate information to their prospective customers. The states are neither regulating the level at which ticket prices are set nor setting the prices themselves and thus are not enforcing the sort of "utility-type" regulation which the legislative history of § 105 indicates was intended to be preempted.

As the court in *People of the State of New York v. Trans World Airlines, supra*, 728 F.Supp. at 176, stated:

> "any relationship between [the state's] enforcement of its laws against deceptive advertising and [the airline's] rates, routes and services is remote and indirect. . . . [the state] does not care about how much [the airline] charges, where it flies, or what amenities it provides its passengers. Its sole concern is with the manner in which [the airline] advertises those matters to . . . consumers. Thus, as far as [the state] is concerned, [the airline] is free to charge $200 or $2000 for a flight from LaGuardia to London, but it cannot take out a full-page newspaper advertisement telling consumers the fare is $200 if in fact it is $2000." (Brackets added.)

The states' protection of consumers from false airline advertising falls squarely within their general police protection powers. The enforcement of state consumer protection laws generally extends to any type of commercial enterprise -- irrespective of size or complexity -- which engages in such activity. There is no indication that Congress, in pursuit of the goal of deregulation, sought to single out the airline industry, as different from all other businesses which do business within the various states, and immunize them from this basic type of state regulation.

This conclusion is supported by the actions of the CAB after the adoption of § 105 (a) (1). The CAB promulgated various regulations setting forth the types of state regulation -- including, e.g., tariff filing, certification, mode of operation, flight frequency, in-flight amenities, liability insurance, bonding, capitalization, overbooking compensation, liability for damaged luggage, and charter services -- which it considered preempted under § 105.

See 14 C.F.R. 399 (1979). *See also* H.R. Rep. No. 98-793, 98th Cong., *reprinted in* 1984 U.S. CODE CONG. & AD. NEWS 2857, 2860; and H.R. Rep. No. 95-1211, 95th Cong. *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 3737, 3752 (the purpose of § 105 is "to prevent . . . inconsistent regulations by providing that when a carrier operates under . . . the Federal Aviation Act, no state may regulate that carrier's routes, rates or services").

Notably, the CAB did not include the regulation of deceptive airline advertising within the scope of federal preemption. Nor is there any mention of the states' inability to regulate false airline advertising in any part of the Congressional record leading up to the adoption of § 105 or the ADA. In testifying before the Subcommittee on Aviation of the Senate Committee on Commerce, Science and Transportation, the CAB expressed its views on the intent and scope of the proposed § 105 as follows:

> "The new section 105 would incorporate into the statute various court decisions which hold that the Federal government has exclusive jurisdiction to regulate rates, routes and service in . . . air transportation. The Board supports this provision. *It would only preclude state regulations which could frustrate the intent of Federal regulatory reform legislation by substituting state utility-type regulation for Federal regulation being loosened or withdrawn.*"

Hearings, 95th Congress, 1st Session, No. 95-10, 1977, p. 191 (italics added). Regulation of deceptive advertising was not one of those utility-type regulations being loosened or withdrawn by Congress.

Except for the Fifth Circuit, those courts which have considered this exact question have found no preemption of state advertising laws in the adoption of § 105 and have embraced an interpretive approach which is consistent with what had been the CAB's approach. *See People of the State of New York v. Trans World Airlines, supra*, 728 F.Supp. 162; *see also People v. Western Airlines*, 155 Cal. App. 3d 597 (1984), *cert. denied sub nom. California v. Western Airlines*, 469 U.S. 1132 (1985), wherein the court held that the enforcement of state laws designed to prevent false advertising does not constitute a law "relating to rates, routes or services" within the meaning of §105; and *Brunwasser v. Trans World Airlines*, 541 F.Supp. 1338 (W.D. Pa. 1982), wherein the court held that the plaintiff's cause of action, brought under Pennsylvania's consumer protection statute and alleging that TWA's advertisement of a special non-stop Pittsburgh to London fare was deceptive and misleading, was not preempted by federal law.

Finally, in *Alaska v. Dept. of Transportation*, 868 F.2d 441 (D.C. Cir. 1989), the District of Columbia Circuit implicitly recognized that § 105 does not preempt state regulation of deceptive airline advertisements. In that case, several states sued the DOT over its adoption of orders permitting air carriers to advertise ticket prices without including certain taxes, fees and surcharges in the advertised amount. In the course of its decision invalidating these orders, the court found that the orders "provide the only possible basis for preemption of state regulation of surcharges other than the departure tax." *Id.*, at 444. If these invalid orders provided "the only possible basis for preemption," then § 105 on its own must not preempt state laws.

Thus, there exists in neither the ADA nor earlier legislation *any* expression -- and certainly no *clear*

expression -- of Congressional intent to preempt the states from taking action against airlines deceptively advertising the ticket prices they themselves have set. Indeed, state regulation of deceptive ticket price advertising furthers Congress' policy of subjecting the airlines to the rigors of competition, including price competition made possible through full and accurate disclosure. The airlines' reliance on § 105 as the basis for preemption of state regulation of deceptive ticket price advertising simply is wrong.

2. Congress Did Not Intend To Occupy The Entire Field Of Deceptive Airline Advertising

The legislative scheme adopted by Congress from 1938 forward shows the lack of Congressional intent to gather unto itself all regulation of all activities of airlines.[3/] When Congress adopted the FAA in 1958, it even added a savings clause to emphasize that dual regulation was the norm. Section 1106 of the FAA provides that "nothing contained in this chapter shall in any way amend or alter the remedies now existing at common law or by statute,

3. Questions concerning the scope of § 105's language and the states' ability to exercise their traditional police powers are not limited to this case alone. *See, e.g., Federal Express Corp. v. California Public Utilities Comm'n*, 936 F.2d 1075 (9th Cir. 1991), *petition for cert. pending*, No. 91-502. That matter raises important issues which, while distinct from those raised in the case *sub judice*, also question what aspects of airline activities Congress meant to preempt when it enacted § 105 of the ADA. Because of the significant implications for the enforcement of state laws which provide for highway safety and fair competition, as well as the disruptive impact to the various motor carrier regulatory programs of the states, forty-six states, as *amici curiae*, have asked this Court to review No. 91-502 so that it may provide, without delay, guidance on the separate issue of the preemptive effect of § 105 in the circumstances of that case.

but the provisions of this chapter are in addition to such remedies." 49 U.S.C. § 1506. This provision signifies that Congress, not having expressly indicated otherwise elsewhere, did not intend to occupy the entire field of regulation of false airline advertising -- a field which has been subject to state regulation. *See International Paper Co. v. Ouellette*, 479 U.S. 481, 492 (1987), wherein this Court stated that such a savings clause can actually "negate the inference that Congress left no room for state causes of action."

To be sure, Congress has always given the federal regulatory body authority to deal with deceptive practices engaged in by airlines. Under § 411 of the FAA (49 U.S.C. § 1381), the federal agency is authorized to issue cease and desist orders to airlines engaged in, *inter alia*, unfair or deceptive practices. This provision, however, clearly was not intended to preempt the states from exercising vis-a-vis airlines their traditional powers of protecting consumers from false advertising. Section 411, which was originally enacted in 1938,[4/] was modeled after § 5 of the Federal Trade Commission Act ("FTC;" 15 U.S.C. § 45). *See Pan American World Airways, Inc. v. United States*, 371 U.S. 296 (1963); 83 CONG. REC. 6430 (May 9, 1938) (remarks of Senator Truman).

The relationship between § 411 of the FAA and § 5 of the FTC Act is significant because § 5 does not preempt state authority to enforce state laws prohibiting deceptive advertising or deceptive trade practices. Rather, the regulation of business activity by the FTC and the

4. The provision was first enacted as section 413 of the Civil Aeronautics Act of 1938, and was repealed and reenacted as section 411 in the Federal Aviation Act of 1958. Section 411 authority was transferred to the DOT in the CAB Sunset Act of 1984.

states has a long history of co-existence. *See American Financial Services v. FTC* 767 F.2d 957, 989 (D.C. Cir. 1985); *Katherine Gibbs School (Inc.) v. F.T.C.*, 612 F.2d 658, 667 (2d Cir. 1979); *Double-Eagle Lubricants, Inc. v. State of Texas*, 248 F.Supp. 515, 517 (N.D. Tex. 1965), *appeal dismissed*, 384 U.S. 434 (1966). The FTC has itself encouraged the adoption of state deceptive practices laws because problems in the marketplace go beyond the enforcement capabilities of the federal government. *See* D. Pridgen, CONSUMER PROTECTION AND THE LAW § 3.02[1] (1986).

In fact, on numerous occasions both the FTC and state law enforcement officials have taken enforcement action against the same offending business enterprise. *See, e.g., In re Koscot Interplanetary, Inc.*, 86 F.T.C. 1106 (1975), *aff'd sub nom. Turner v. F.T.C.*, 580 F.2d 701 (D.C. Cir. 1978), *State ex rel. Sanborn v. Koscot Interplanetary, Inc.*, 512 P.2d 416 (Kansas 1973) and *State ex rel. Turner v. Koscot Interplanetary, Inc.*, 191 N.W.2d 624 (Iowa 1971).

Thus, with respect to every industry in the United States that is subject to the deceptive trade practice jurisdiction of the Federal Trade Commission, Congress and the courts have rejected a policy of exclusive federal regulation of deceptive acts and practices. In view of that fact, it is unlikely that Congress, in adopting a regulatory scheme modeled on § 5 of the FTC Act, would have discarded its policy of dual state and federal regulation without comment. There was no express preemption provision in the Civil Aeronautics Act of 1938.

Similarly, there is no mention in any of the legislative history of that act of any intent to establish an exclusively federal system of regulation of deceptive advertising by the airline industry. Moreover, when § 411

was added to the Federal Aviation Act of 1958, there was still no indication that Congress intended that the power to regulate deceptive airline advertising would reside solely in the CAB. For this reason, in *Nader v. Allegheny Airlines, supra*, 426 U.S. 290, this Court specifically held that the existence of § 411, which gives the federal agency jurisdiction to deal with deceptive airline practices, does not preempt a state law claim brought against an airline for fraudulent misrepresentation.

The airlines in this matter contend that a House Committee Report accompanying the 1984 Sunset Act's transfer of responsibility for enforcing § 411 to the DOT demonstrates that Congress intended to occupy the entire field of regulation of deceptive airline advertisements. They are mistaken. The relevant portion of this report states:

> "The Committee believes that after CAB sunset there should continue to be authority in the Federal government to protect consumers against unfair and deceptive practices. Although these regulations touch relatively limited areas of airline operations they furnish important protections for consumers and we do not wish to see these regulations end precipitously when CAB sunsets. The authority now held by CAB (under section 411) duplicates authority which the Federal Trade Commission has to protect consumers in other industries under section 5 of the Federal Trade Commission Act. The additional authority which the Board holds under section 404 and other provisions permits it to deal with such problems as discrimination against the handicapped and smoking on aircraft.

> "These problems involve important issues of health, passenger comfort, and social policy, and in these limited areas the solutions reached by the marketplace are not always acceptable.
>
> "In addition to protecting consumers, federal regulation insures a uniform system of regulation and preempts regulation by the states. If there was no Federal regulation, the states might begin to regulate these areas, and the regulations could vary from state to state. This would be confusing and burdensome to airline passengers, as well as to the airlines."

H.R. Rep. No. 98-793, 98th Cong., *reprinted in* 1984 U.S. CODE CONG. & AD. NEWS 2857, 2860.

This report, which was drafted forty-six years after Congress enacted § 411 and six years after Congress enacted the express preemption provisions of § 105,[5]

5. Plaintiffs' reliance on this 1984 House Report in support of their argument that § 105 expressly preempts the states from taking action against deceptive airline ticket price advertisements is misplaced since the report is not a part of the legislative history of the 1978 enacted ADA and may not therefore be considered as a reliable statement of congressional intent in 1978. *See Regional Railway Reorganization Act Cases*, 419 U.S. 102 (1974), wherein this Court at 419 U.S. 132, rejected the interpretation of the effect of a statute put forward by thirty-six members of Congress in their *amicus curiae* brief, stating that the Congressmen's post passage statements "represent only the personal views of these legislators, since the statements were [made] after the passage of the Act.' *National Woodwork Manufacturer's Ass'n. v. National Labor Relations Board*, 386 U.S. 612, 639 n. 34 (1967)."; *see also Rogers v. Frito-Lay, Inc.*, 611 F.2d 1074, 1080 (5th Cir. 1980).

indicates only that Congress intended to transfer to DOT the CAB's authority to enforce its regulations and issue new regulations. There is no indication in this report that Congress in 1984 intended to dismantle the dual system of regulation that had existed since 1938. Had Congress intended to do so, it would have expressly said so. The reference in the report to the preemptive effect of properly adopted specific, and limited, CAB regulations does not suggest otherwise.

The Report listed the specific areas of regulation Congress was concerned with, including "over booking and denied boarding compensation, limitations on liability for lost or damaged baggage, smoking, discrimination against the handicapped, terms of charter service, and the notice which airlines must give passengers of contractual terms between the passenger and the carrier." *Id.* But nowhere does the Report list deceptive advertising as an area requiring an exclusive federal presence. In fact, it implicitly excludes that area when it narrows its concerns to those areas where states "might begin" to regulate -- states were already regulating deceptive airline advertising and the courts were upholding deceptive advertising laws against preemption challenges as applied to airline advertising. *See People v. Western Airlines, supra*, 155 Cal. App. 3d 597.

Preemption occurs in a dual system of regulation only when specific federal enactments conflict with state law. *See Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963). Thus, the mere mention by Congress that federal regulations in an area have a preemptive effect does not, as the airlines have urged, compel the conclusion that Congress, in merely transferring to DOT the responsibility for administering § 411, intended to occupy the entire field of deceptive airline advertising regulation.

3. There Is No Conflict Between State Law And Any Valid Federal Law

The question then becomes whether, when a state interprets its deceptive practices law to require that the advertised price of an airline ticket must be truthful and set forth the entire price a consumer must pay to purchase the advertised ticket, such an interpretation is in conflict with any federal law.

The requirement that airline advertisements of ticket prices disclose the total amount of the fare is consistent with valid federal regulations which govern ticket price advertisements. In December, 1984, the CAB promulgated a regulation which provides:

> "The Board considers any advertising or solicitation by a direct air carrier, indirect air carrier, or an agent of either, for passenger air transportation, a tour (i.e., a combination of air transportation and ground accommodations), or a tour component (e.g., a hotel stay) that states a price for such air transportation, tour or tour component, *to be an unfair or deceptive practice, unless the price stated is the entire price to be paid by the customer to the air carrier, or agent, for such air transportation, tour, or tour component.*"

14 C.F.R. § 399.84 (italics added); *see also* 14 C.F.R. § 380.80 (governing public charters).

Thus, a CAB enacted regulation, which was adopted by DOT when it took over from the CAB, requires that the ticket price advertised be the total cost of the ticket, including any applicable surcharges or taxes. This

regulation is entirely consistent with the interpretation of state law which is urged by the states and which the airlines are now challenging.[6/]

In this proceeding, however, the airlines have argued that such an interpretation of state law is in conflict with three subsequent DOT orders and is therefore preempted by them. Again the airlines are incorrect. These three orders are invalid and may not, therefore, preempt any state law.

The first of these orders, DOT Order 85-12-68, was issued on December 31, 1985 and permits airline advertisers to separate from the total price the $3 international departure tax without having to display the total price anywhere in the advertisement. The second of these orders, DOT Order 88-3-25, was issued on March 10, 1988, and permits air carriers to exclude eight various surcharges and fees from the advertised price as long as the excluded amounts are stated elsewhere in the advertisements as add-ons. There is no requirement that the total price of the fare be displayed. The third of the orders, DOT Order 88-8-2, was issued on August 2, 1988 and clarified the March 10, 1988 order by specifying, *inter alia*, that the advertised price of an airline ticket need not include any carrier fees or surcharges approved by the U.S. Government for separate imposition on individual

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6. Additionally, Congress has, at a minimum, also expressed its view that full ticket price advertising is desirable. Pursuant to 26 U.S.C. § 7275 advertisements which state the cost of an airline ticket shall, with certain exceptions, state such cost as the *total* of 1) the amount to be paid for such transportation *plus* 2) various taxes, including an international departure tax, imposed by 26 U.S.C. § 4261. *See* 26 U.S.C. § 7275(b)(1). Although the statute also allows an advertiser to state the cost of the taxes separately, it nevertheless requires that the total fare be stated at least as prominently as its components.

passengers as long as such charges are stated elsewhere in the advertisements.

In *Alaska v. Dept. of Transportation, supra*, 868 F.2d 441, the District of Columbia Circuit invalidated the March 10, 1988 and August 2, 1988 DOT orders. In its decision, the court found that these orders were legislative, as opposed to interpretative, rules and, as such, must be adopted in a manner which complies with the Administrative Procedure Act ("APA") notice and comment requirements and procedures (5 U.S.C. § 553 (b)(c)). Since DOT failed to employ these procedures, the orders were deemed to be invalid. 868 F.2d at 447.

Although the Court in the *Alaska* case did not specifically address the issue of the invalidity of the December 31, 1985 order, that order nevertheless is indistinguishable from the other two orders with respect to its procedural invalidity. Like the two invalidated orders, it is a "legislative rule recognizable by virtue of its binding effect." *Id.*, at 445. Like the two invalidated rules, it was promulgated without adherence to the APA procedure applicable to legislative rules, which requires notice and comment. The order is, therefore, procedurally invalid and has no binding effect.[7/]

---

7. This Court should not countenance the airlines' attempt in this proceeding to give this order preemptive force merely because the order has not, until now, been procedurally challenged. Although a petition seeking review of the order was not filed within 60 days of its entry (*see* 49 U.S.C. § 1486(a)), the "summary promulgation" of this order requires that the procedure which the agency followed in its issuance be reviewable in a proceeding where the validity of the order is invoked. *See RSR Corp. v. Donovan*, 747 F.2d 294, 300 (5th Cir. 1984); *Deering Milliken, Inc. Unity Plant v. Occupational Safety and Health Review Commission*, 630 F.2d 1094, 1099 (5th Cir. 1980).

In addition, the December 31, 1985 order is substantively invalid. It is well established that "where an administrative regulation conflicts with a statute, the statute controls." *United States v. Doe*, 701 F.2d 819, 823 (9th Cir. 1983). *See also, Marshall v. Gibson's Products, Inc. of Plano*, 584 F.2d 668, 677-678 (5th Cir. 1978) ("the agency cannot do what Congress by statute precludes"); *Meade Township v. Andrus*, 695 F.2d 1006, 1009 (6th Cir. 1982) (holding that where an agency promulgates a regulation which is inconsistent with a governing statute, courts are constrained to declare the regulation invalid).

Likewise the rule applies in this situation. Following proper notice and comment procedures, the "law" in the form of a regulation, 14 C.F.R. § 399.84, was adopted by the CAB in 1984 and readopted by the DOT -- it declares the practice of non-disclosure of the total ticket price when a price is advertised to be deceptive and unfair. Without following proper procedures to amend the "law," DOT issued an order which conflicts with the "law." Since DOT's December 1985 order permits the airlines to do otherwise than follow the "law," it is, for this reason, invalid on substantive grounds.[8/]

---

8. Courts have held that there is no time limit on challenging the substantive statutory authority of an agency to adopt a rule. *See State of Texas v. United States*, 749 F.2d 1144, 1146 (5th Cir. 1985), *cert. denied sub nom. Interstate Commerce Commission v. State of Texas*, 472 U.S. 1032 (1985); *Alabama Association of Insurance Agents v. Bd. of Governors of the Federal Reserve System*, 533 F.2d 224, 235 (5th Cir. 1976), *vacated in part*, 558 F.2d 729 (5th Cir. 1977), *cert. denied*, 435 U.S. 904 (1978) ("we would partially abdicate our judicial duty if we were to allow the time limit for direct review to validate forever this regulation, which has never been judicially tested, from scrutiny as to its consistency with Congressional mandate"). *See also Functional Music, Inc. v. FCC*, 274 F.2d 543, 546 (D.C. Cir. 1958) *cert. denied*, 361 U.S. 813 (1959).

The states' interpretation that their deceptive practices laws require airlines to include the total cost of an airline ticket in their advertised fare is thus consistent with binding federal law. There simply is no conflict between federal law, valid federal regulations and state law. State enforcement of state deceptive practices laws are therefore not preempted.

CONCLUSION

Both to restore the inherent balance of federalism and for the reasons expressed above, the Court should reverse the ruling of the Fifth Circuit that the Federal Aviation Act, § 105 (a) (1), preempts states from enforcing their deceptive practices acts against false and deceptive airline advertising which appears in their states.

DATED: January 10, 1992

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FOR ARGUMENT

(15)

No. 90-1604

Supreme Court, U.S.
FILED
FEB 13 1992
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

DAN MORALES, Attorney General of Texas,
Petitioner,

v.

TRANS WORLD AIRLINES, INC., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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QUESTION PRESENTED

Whether section 105(a)(1) of the Airline Deregulation Act, which provides that "no State . . . shall enact or enforce any law . . . or other provision having the force and effect of law relating to rates, routes, or services of any air carrier," bars Texas and other states from enforcing detailed rules that specify what air carriers may and may not say when advertising rates.

PARTIES BELOW

The appellants in the court below were the Attorney General of Texas and the Attorneys General of the following additional States: Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Florida, Idaho, Illinois, Iowa, Kansas, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, Nevada, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Rhode Island, South Dakota, Tennessee, Vermont, Washington, West Virginia, Wisconsin and Wyoming.

The appellees were Trans World Airlines, Inc., Continental Airlines, Inc., British Airways PLC, Pan American World Airways, Inc., Air Canada, Campagnie Nationale Air France, Alitalia-Linee Aeree Italiane, S.p.A., El Al Israel Airlines Ltd., Finnair, Lufthansa German Airlines, Japan Air Lines Company, Ltd., Qantas Airways Ltd., Scandinavian Airlines System, and Viacao Aerea Rio-Grandense, all of whom are respondents here. Respondents' parent companies and subsidiaries (except wholly owned subsidiaries) are listed in App. G, *infra*, at 34a-43a.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 90-1604

DAN MORALES, Attorney General of Texas,
Petitioner,
v.
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Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR THE RESPONDENT AIRLINES

OPINIONS BELOW

The opinion of the court of appeals affirming the grant of a permanent injunction (Pet. App. 1a-7a) is reported at 949 F.2d 141. The opinion of the district court granting the permanent injunction (Pet. App. 8a-12a) is not reported. The earlier opinion of the court of appeals affirming the grant of a preliminary injunction (Pet. App. 13a-47a) is reported at 897 F.2d 773. The opinions and orders of the district court granting the preliminary injunction (Pet. App. 48a-65a) are reported at 712 F. Supp. 99.

JURISDICTION

The judgment of the court of appeals was entered on January 18, 1991. The petition for a writ of certiorari was filed on April 16, 1991, and was granted on Novem-

ber 27, 1991. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article VI of the Constitution of the United States in pertinent part provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; . . . .

Sections 102, 105, 411, and 1106 of the Federal Aviation Act of 1958, as amended, 49 U.S.C. app. §§ 1302, 1305, 1381, and 1506 (1988), in pertinent part provide:

> Section 102(a). In the exercise and performance of its powers and duties under this chapter, the Board shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity:
>
> . . .
>
> (3) The availability of a variety of adequate, economic, efficient, and low-price services by air carriers and foreign air carriers without unjust discriminations, undue preferences or advantages, or unfair or deceptive practices . . . .
>
> (4) The placement of maximum reliance on competitive market forces and on actual and potential competition (A) to provide the needed air transportation system, and (B) to encourage efficient and well-managed carriers to earn adequate profits and to attract capital . . . .
>
> . . .
>
> (7) The prevention of unfair, deceptive, predatory, or anticompetitive practices in air transportation . . . .
>
> . . .

> (9) The encouragement, development, and maintenance of an air transportation system relying on actual and potential competition to provide efficiency, innovation, and low prices, and to determine the variety, quality, and price of air transportation services.

> Section 105(a)(1). . . . [N]o State or political subdivision thereof and no interstate agency or other political agency of two or more States shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier having authority under subchapter IV of this chapter to provide air transportation.

> Section 411(a). The Board may, upon its own initiative or upon complaint by any air carrier, foreign air carrier, or ticket agent, if it considers that such action by it would be in the interest of the public, investigate and determine whether any air carrier, foreign air carrier, or ticket agent has been or is engaged in unfair or deceptive practices or unfair methods of competition in air transportation or the sale thereof. If the Board shall find, after notice and hearing, that such air carrier, foreign air carrier, or ticket agent is engaged in such unfair or deceptive practices or unfair methods of competition, it shall order such air carrier, foreign air carrier, or ticket agent to cease and desist from such practices or methods of competition.

> Section 1106. Nothing contained in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies.

The Texas Deceptive Trade Practices—Consumer Protection Act, Texas Bus. & Comm. Code Ann. §§ 17.41, *et seq.* (Vernon 1986), in pertinent part provides:

> Section 17.46. (a) False, misleading, or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful. . . .

(b) . . . [T]he term "false, misleading, or deceptive acts or practices" includes, but is not limited to . . . advertising goods or services with intent not to sell them as advertised . . . [or] making false or misleading statements of fact concerning the reasons for, existence of, or amount of price reductions. . . .

(c)(1) It is the intent of the legislature that . . . the courts to the extent possible will be guided by . . . the interpretations given by the Federal Trade Commission and federal courts to Section 5(a)(1) of the Federal Trade Commission Act.

STATEMENT

1. *The Airline Deregulation Act of 1978.* The airline industry was highly regulated prior to 1978. Pursuant to the Civil Aeronautics Act of 1938 ("Aeronautics Act"), ch. 601, 52 Stat. 973 (1938), the Civil Aeronautics Board ("CAB") exercised comprehensive regulatory control over interstate air carriers. Under this regulatory regime, competitive market forces played only a subsidiary role.

Although the CAB's regulatory authority was wide-ranging, the Aeronautics Act did not explicitly preempt state law. This left states free to impose additional nonconflicting economic regulations of their own. *See* Freeman, *State Regulation of Airlines and the Airline Deregulation Act of 1978*, 44 J. Air L. & Comm. 747, 750 (1979). Thus, some states exercised authority to approve intrastate routes and to set the intrastate rates that interstate carriers could charge. *See, e.g., People of the State of California v. CAB*, 581 F.2d 954, 956 (D.C. Cir. 1978), *cert. denied*, 439 U.S. 1068 (1979); *Texas Int'l Airlines, Inc. v. CAB*, 473 F.2d 1150, 1152 (D.C. Cir. 1972); *People v. Western Airlines*, 42 Cal. 2d 261, 268 P.2d 723, *appeal dismissed*, 348 U.S. 859 (1954). And even though the CAB had authority, now codified in section 411(a) of the Federal Aviation Act of 1958 ("FAA Act"), 72 Stat. 731 (codified as amended, 49 U.S.C. app. § 1381(a)), to prohibit carriers from engaging in unfair or deceptive practices, states retained parallel authority to enforce their own rules against such practices. *See Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290 (1976).

Over time, however, Congress became dissatisfied both with the tight regulatory control exercised by the CAB, "which restrict[ed] price competition at the public's expense," and also with the "confusing system of dual [federal and state] regulation." S. Rep. No. 631, 95th Cong., 2d Sess. 3, 98 (1978). Each of these perceived problems was addressed by the Airline Deregulation Act of 1978 ("Deregulation Act"), Pub. L. No. 95-504, 92 Stat. 1705 (1978).

As its name implies, the principal thrust of the Deregulation Act was to free the airline industry from its regulatory straitjacket and encourage "maximum reliance on competitive market forces." Deregulation Act § 102(a)(4), 49 U.S.C. app. § 1302(a)(4). Congress sought development "of an air transportation system relying on actual and potential competition to provide efficiency, innovation, and low prices, and to determine the variety, quality, and price of air transportation services." Deregulation Act § 102(a)(9), 49 U.S.C. app. § 1302(a)(9). Congress intended that, subject to a gradual phase-in, "prices, route structures, and the nature and variety of air services [would] be set by the independent forces of the free market and airline management decisions, rather than by the Board." S. Rep. No. 631 at 5.

The Deregulation Act marked a "major change and fundamental redirection as to the manner of regulation of interstate and overseas air transportation so as to place primary emphasis on competition." *Id.* at 52. The CAB was "instructed to make every effort to utilize competition and market forces to achieve regulatory goals." *Id.* As a corollary, the Act stressed the responsi-

bility of the federal government to police the market in order to ensure that it operates fairly and without distortion. In a new declaration of policy, Congress directed the CAB to prevent "unfair, deceptive, predatory, or anticompetitive practices in air transportation," Deregulation Act § 102(a)(7), 49 U.S.C. app. § 1302(a)(7), and the CAB's pre-existing authority under section 411(a) to root out unfair and deceptive practices was preserved intact.

As an integral part of "this new, comprehensive legislation, which entirely overhauls the aviation regulatory system," H.R. Conf. Rep. No. 1779, 95th Cong., 2d Sess. 56 (1978), Congress explicitly preempted state law, explaining that "it is important that only one standard of regulation be provided for airlines operating under the authority of the CAB." S. Rep. No. 631 at 98. Congress barred the states and their political subdivisions from "enact[ing] any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier." Deregulation Act § 105(a)(1), 49 U.S.C. app. § 1305(a)(1). At the same time, however, Congress (without any reference in the legislative history to the fact that it was doing so) left standing section 1106 of the FAA Act (codified as amended, 49 U.S.C. app. § 1506), which was enacted in 1938 to provide that "[n]othing contained in this chapter shall in any way abridge or alter the remedies *now existing* at common law or by statute." Aeronautics Act, ch. 601, 52 Stat. at 1027 (emphasis added).

The Deregulation Act was followed by the Civil Aeronautics Board Sunset Act of 1984 ("Sunset Act"), Pub. L. No. 98-443, 98 Stat. 1703 (1984), which transferred the remaining powers and duties of the CAB to the Department of Transportation ("DOT"). The Sunset Act preserved (with minor amendment) both section 105(a)(1), providing for explicit federal preemption, and section 411(a), conferring explicit regulatory authority

over unfair and deceptive practices. *See* Sunset Act, 98 Stat. at 1704. The accompanying House report explained that continuing federal preemption was of particular importance in the area of consumer protection, for otherwise "regulations could vary from state to state. This would be confusing and burdensome to airline passengers, as well as to the airlines." H.R. Rep. No. 793, 98th Cong., 2d Sess. 4 (1984). The report further explained that Congress had chosen to consolidate the "CAB's consumer protection and unfair competitive practices authorities" in DOT, rather than conferring such authority jointly on DOT and the Federal Trade Commission ("FTC"), in order to avoid the potential for conflict or confusion that might arise "[i]f two agencies shared authority." *Id.* at 6.

2. *Federal regulation of unfair and deceptive practices.* Immediately following passage of the Deregulation Act, the CAB stated its understanding of the scope of preemption under section 105(a)(1). The CAB explained that "[o]ne policy behind section 105 was to prevent State economic regulation from frustrating the benefits of decreased Federal regulation" and that "[a]nother policy was to avoid the confusion caused under existing law which permitted dual State and Federal regulation." 44 Fed. Reg. 9948, 9949 (1979). Reading section 105(a)(1) in light of those policies, the CAB concluded that Congress "intended that the Board would exercise sole and complete economic regulatory jurisdiction over all federal carriers' operations." *Id.* at 9950. The CAB therefore announced that it was "occupying the entire field of economic regulations." *Id.* at 9948. Noting that inconsistent state regulation could "chill the enthusiasm of carrier management to make competitive route and rate decisions—for example, to enter new markets or adopt innovative pricing policies," *id.* at 9949, the CAB promptly issued a new regulation reiterating that states are preempted from engaging in the economic regulation

of interstate air carriers. *See* 14 C.F.R. § 399.110 (1990).

Before 1978, air carriers had not competed on the basis of price, and thus there had been little or no occasion for either federal or state monitoring of airfare advertising. But with the advent of decontrol, regulatory attention turned to that issue. In 1984, the CAB addressed a specific aspect of airfare advertising by regulation, determining that "the price stated [must be] the entire price to be paid by the customer." 14 C.F.R. § 399.84 (1990). When regulatory authority then passed from the CAB to DOT pursuant to the Sunset Act, DOT established "a consumer affairs office to resolve individual consumer complaints, including complaints about advertising." App. A, *infra*, at 3a. Since then, DOT has issued a series of orders pertaining to airfare advertising. In Order 85-12-68, DOT permitted the "international departure tax [to be stated] separately from other charges in advertisements and promotional materials." J.A. 39a. In Orders 88-3-25 and 88-8-2, DOT similarly permitted immigration fees and security surcharges to be stated separately. *Id.* at 41a, 45a.

Following invalidation of the latter two orders on procedural grounds, *see Alaska v. Skinner*, 868 F.2d 441 (D.C. Cir. 1989), DOT once again announced, in Order 89-4-25, that "we do not regard separate listing of these surcharges as an unfair or deceptive advertising practice." App. D, *infra*, at 27a n.1. In addition, DOT proposed regulations to codify its policies of permitting separate listing of various government-imposed or government-approved surcharges and of allowing the advertisement of "one-way fares that require round-trip purchases, provided that the advertisement indicates clearly that these fares are available only in conjunction with a round-trip purchase." 54 Fed. Reg. 31052, 31053 (1989). Such rules are appropriate, DOT explained, to avoid "placing any restrictions on the industry that are not

necessary and that would tend to limit airline price competition." *Id.* In proposing these rules, DOT stressed the importance of uniformity and the significance of federal preemption with respect to airfare advertising:

> To allow the 50 states to regulate price advertising and institute related enforcement proceedings would subject the carriers to inconsistent standards and thus seriously interfere with interstate commerce. . . .
>
> . . . [W]ithout a uniform policy, carriers would find it virtually impossible to put together nation-wide advertising programs that accurately portray the price of their services. Price competition would suffer, thus depriving consumers of lower fares.

Id. at 31054.

In the meantime, DOT "has enforced section 411 aggressively, primarily emphasizing consumer protection. . . . [As of August 1990, DOT] has issued some fifty orders to cease and desist under section 411 and has assessed civil penalties totaling more than one million dollars. Seven of these orders and nearly $100,000 of the civil penalties have concerned unfair or deceptive fare advertising by airlines. Additionally, [DOT] has resolved consumer problems in innumerable cases where enforcement action would not have been appropriate." App. E, *infra*, at 30a-31a. DOT also has "reached substantial settlements involving monetary restitution to consumers." App. F, *infra*, at 33a.

3. *Development of the NAAG Guidelines.* In December 1987, the National Association of Attorneys General ("NAAG"), dissatisfied with federal enforcement efforts, adopted its Air Travel Industry Enforcement Guidelines "as a statement of the general enforcement policy of the Attorneys General." National Ass'n of Attorneys General, *Resolution Adopting The Air Travel Industry Enforcement Guidelines* (March 1988), U.S. App. 7a ("U.S. App." refers to the appendix to the brief submitted by the United States at the petition stage in Nos. 90-1604

and 90-1606). These Guidelines purport to "explain in detail how existing state laws apply to air fare advertising." National Ass'n of Attorneys General, Task Force on the Air Travel Industry, *Guidelines and Commentary* (April 1988), U.S. App. 11a. The Guidelines set forth eight rules that, according to NAAG, state consumer protection laws require carriers, travel agents, and others to follow when advertising airfares:

> 1. "Any advertisement which provides air fares or other price information must be in plain language, clear and conspicuous, and non-deceptive. Deception may result . . . from omitting or obscuring a material restriction." U.S. App. 18a.
>
> 2. "Print advertisements for fares must make clear and conspicuous disclosure of restrictions such as:
>
> - Limited time availability.
> - Limitations on right to refund or exchange of ticket.
> - Time of day or day of week restrictions.
> - Length of stay requirements.
> - Advance purchase requirements.
> - Round trip purchase requirements.
> - Variations in fares to or from two or more airports serving the same metropolitan area.
> - Limitations on, or extra charges for, breaks or changes in itinerary, such as failure to travel on every leg as scheduled."

Id. at 18a-19a.

3. "Broadcast commercials for fares must make clear and conspicuous disclosure of:

- Limited-time availability.
- Limitations on right to refund or exchange of ticket."

In addition, disclosure of seven other types of restriction must be made "orally to the passenger before reservations are actually made." *Id.* at 21a-22a.

4. "Any billboard which provides air fare or other price information on a fare to which any material restrictions apply must have clear and conspicuous language such as 'Substantial restrictions apply.' The statement 'Restrictions apply' is not sufficient." *Id.* at 24a.

5. "Any advertised fare must be available in sufficient quantity so as to meet reasonably foreseeable demand on every flight each day for the market in which the advertisement appears, beginning on the day on which the advertisement appears and continuing for at least three days after the advertisement terminates.

However, if the advertised fare is not thus available, the advertisement must contain a clear and conspicuous statement of the extent of unavailability of the advertised fare.

Statements such as 'Seats limited' and 'Restrictions apply' do not meet this Guideline." *Id.* at 24a.

6. "Any fuel, tax, or other surcharge to a fare must be included in the total advertised price of the fare." *Id.* at 26a.

7. "If an airline elects to advertise the one-way portion of a fare that is only available as a round-trip purchase, this restriction together with the full round-trip fare, must be advertised in a clear and conspicuous manner, at least as prominently as the one-way fare." *Id.* at 26a-27a.

8. "A fare may be advertised by use of . . . words [such as] 'sale,' 'discount,' [and] 'reduced' . . . only if that fare is:

- available only for a specified, limited period of time, and

- substantially below the usual price for the same fare with the same restrictions." *Id.* at 27a.

Although stating the importance of "uniform guidelines," NAAG expressly disavowed any intention of actually imposing uniformity on its members: the Guidelines are "subject to the exercise of . . . individual prosecutorial discretion, and variations or supplementations to allow for . . . differences in individual state or common law." *Id.* at 6a-7a.

Prior to adopting the Guidelines, NAAG had circulated them to DOT and the FTC, among others, for comment. Both federal agencies criticized the Guidelines on the merits and strongly opposed their adoption. The FTC pointed out that because "extensive disclosure requirements . . . could severely curtail the price advertising in this industry," the Guidelines "could have the unintended consequence of substantially inhibiting effective price competition." App. A, *infra*, at 4a, 2a. DOT additionally objected that the Guidelines "appear to be preempted by the Federal Aviation Act . . . or [DOT] rules or would unduly burden interstate commerce." App. B, *infra*, at 12a.

4. *Events leading to this litigation.* In February 1988, the Attorneys General of Colorado, Kansas, Massachusetts, Missouri, New York, Texas, and Wisconsin announced that they intended to "bring . . . advertisements into compliance with the standards delineated in the [NAAG] guidelines for fare advertising." J.A. 123a. DOT responded that "we have specifically permitted the type of advertising to which the Attorneys General object" and asserted that "the Federal government has preempted this aspect of State price advertising regulation." *Id.* at 127a. Undeterred, the Attorney General of Texas, acting on behalf of the States of Texas, California, Massachusetts, New York, and Washington, wrote to, *inter alia*, respondents Trans World Airlines, Inc. ("TWA"), Continental Airlines, Inc. ("Continental"), and British Airways PLC ("British Air") in November

1988, "notifying them that some of their advertisements violated the NAAG guidelines and these states' false advertising and deceptive practices laws [including the Texas Deceptive Trade Practices Act] . . . [and] charg[ing] that the airlines had attempted to make their fares appear lower than those of their competitors by prominently advertising the ticket price, while less prominently disclosing taxes, surcharges and fees." Pet. App. 15a. In particular, the airlines were advised that "any fuel, tax or other surcharge to a fare must be included in the total advertised price of the fare." J.A. 185a. The airlines were directed to comply with the NAAG Guidelines, and thus to abandon a form of advertising expressly permitted by DOT, on pain of prosecution under state law.

5. *Litigation in the district court.* Faced with this ultimatum, TWA, Continental, and British Air brought suit in the United States District Court for the Western District of Texas, seeking to enjoin the Attorney General of Texas from enforcing the NAAG Guidelines under cover of the Texas Deceptive Trade Practices Act. J.A. 3a. Jurisdiction rested on 28 U.S.C. §§ 1331 and 1337. *Id.* at 2a. Following a hearing, the district court determined that the airlines had established the likelihood of success on the merits of their claim that the threatened enforcement actions were barred by section 105(a)(1) of the Deregulation Act. Consequently, the court found it unnecessary to reach the airlines' alternative contentions that state enforcement of the NAAG Guidelines "constitutes an undue burden on interstate and foreign commerce in violation of the Commerce Clause; violates the constitutional prohibition against interstate compacts . . .; or violates [the airlines'] First Amendment rights." Pet. App. 49a. Because the airlines also had satisfied the other requirements for preliminary injunctive relief, the court preliminarily enjoined the Attorney General of Texas, and also the attorneys general of thirty-three other states who had intervened as defendants, from

enforcing the NAAG Guidelines in the guise of state consumer protection law. *Id.* at 49a-50a.

6. *The first appeal.* The Fifth Circuit affirmed, reasoning that "state laws pertaining to deceptive advertising have been expressly preempted by federal law when applied to fare advertising by interstate and international airlines." Pet. App. 23a. The court began by noting that section 105(a)(1) of the Deregulation Act preempts all state laws "relating to rates, routes, or services," and that this Court has held that a state law "relates to" a subject, as that term is used in a preemption statute, if it "has a connection with or reference to" the subject. *Id.* at 26a, citing *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96-98 (1983). The court further noted that the Seventh Circuit earlier had concluded that "[p]ricing advertising surely 'relates to' price" and that other courts had reached similar conclusions concerning the reach of section 105(a)(1). *Id.* at 26a-28a, citing *Illinois Corporate Travel, Inc. v. American Airlines, Inc.*, 889 F.2d 751, 754 (7th Cir. 1989), *cert. denied*, 110 S. Ct. 1948 (1990); *New England Legal Found. v. Massachusetts Port Auth.*, 883 F.2d 157 (1st Cir. 1989); *O'Carroll v. American Airlines, Inc.*, 863 F.2d 11 (5th Cir.), *cert. denied*, 490 U.S. 1106 (1989); *Anderson v. USAir, Inc.*, 818 F.2d 49 (D.C. Cir. 1987); and *Hingson v. Pacific Southwest Airlines*, 743 F.2d 1408 (9th Cir. 1984).

The court then reviewed the legislative history of section 105(a)(1) and determined that it "demonstrates the intent of Congress to expressly preempt state regulation of airline fare advertising, leaving no right of action that arises under state law only." Pet. App. 31a. In addition, "[s]ubsequent legislation has confirmed the intent of Congress to preempt state regulation of airline fare advertising." *Id.* at 32a. Because "enforcement of a state law regulating fare advertising by airlines has a connection with or reference to rates within the meaning of § 1305(a)(1) . . . such state action is expressly preempted." *Id.* at 33a. This Court denied certiorari on October 15, 1990. 111 S.Ct. 307, 308 (1990).

7. *Entry of final judgment and the second appeal.* After the Fifth Circuit affirmed the award of preliminary relief, the district court granted summary judgment for the airlines; issued a permanent injunction; and entered final judgment. Pet. App. 10a. The Fifth Circuit, relying upon its earlier opinion, affirmed *per curiam*. *Id.* at 1a.

INTRODUCTION AND SUMMARY OF ARGUMENT

A. Introduction

1. This case arose as a dispute over threatened enforcement of the NAAG Guidelines. The Attorneys General of Texas and certain other states demanded that airlines "bring their advertisements into compliance with the standards delineated in [those] guidelines," J.A. 123a, and, in particular, with the requirement that "[a]ny fuel, tax, or other surcharge . . . be included in the total advertised price of the fare." *Id.* at 124a. When the airlines, relying upon DOT Order 85-12-68, refused to accede to that demand, the attorneys general "reaffirmed the position of the states regarding fare surcharges in advertisements," *id.* at 112a, and threatened to secure compliance by bringing suit under their "respective state consumer protection laws." *Id.* at 115a.

In response, the airlines brought this suit against the Attorney General of Texas to "enjoin[] and restrain[] the implementation of the [NAAG] Guidelines . . . through enforcement of [the Texas Deceptive Trade Practices—Consumer Protection Act]." J.A. 3a. They asked that the Attorney General be enjoined "from taking any action against plaintiffs pursuant to [that Act] or any other state law in conjunction with the NAAG Guidelines as they purport to regulate plaintiffs' . . . advertising of their rates, routes and services." *Id.* at 24a. *See also id.* at 10a-15a.

The district court issued the injunction upon finding that the airlines would suffer immediate and irreparable injury if an enforcement action was brought against them "in accordance with the [NAAG] Guidelines . . . on account of [their] air fare advertising." Pet. App. 48a-49a. The court subsequently permitted joinder and enlarged the injunction to include certain other attorneys general who "are attempting to use state law to enforce the NAAG guidelines relating to airline advertising." *Id.* at 60a.

The states have chosen in this Court to characterize the scope of the injunction broadly. They imply that they are precluded, for example, from enforcing laws of general applicability that prohibit advertisers from making false statements of fact. *E.g.*, Texas Br. 29-30. But that is not what this case is about. The issue here is narrow, specific, and concrete. It arises from and concerns only the states' threatened attempts to enforce the detailed, industry-specific restrictions that the NAAG Guidelines place solely on the advertising of airfares.

The NAAG Guidelines are narrowly drawn to regulate *only* the airline industry. They are not rules of general application; they do not apply to the advertising of prices by any other industry or group of sellers. The states have singled out the airline industry for special attention and have subjected that industry to exhaustive special rules. Those rules specify in elaborate detail precisely what airlines may and may not say when advertising their airfares. The Guidelines thus represent the states' concerted effort to micromanage the advertising of airfares on a nationwide basis. That effort cannot be squared with the Deregulation Act.

2. Section 105(a)(1) of the Deregulation Act provides that "no State . . . shall enact or enforce any law . . . standard, or other provision having the force and effect of law relating to rates, routes, or services." The statutory language suggests two different questions pertinent to this case: (1) whether the NAAG Guidelines "relat[e] to rates;" and (2) whether those Guidelines constitute either "law" or "standard[s], or other provision[s] having the force and effect of law." The second of these two questions need not detain us for long.

The NAAG Guidelines are not law in the same sense that a common law rule, statute, or lawfully promulgated regulation is law; they have not been adopted by any court, enacted by any legislative body, or promulgated by any administrative agency acting with properly delegated authority. The Guidelines nevertheless "serve as instruments of regulation." *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 69 (1963). The states seek to enforce the Guidelines as if they have been incorporated by legislative action into existing consumer protection law—to treat the Guidelines, in other words, as "standard[s], or other provision[s] having the force and effect of law." Congress foresightedly included such standards and provisions within the ambit of section 105(a)(1) in order to prevent the states from evading federal preemption through the use of novel devices such as the NAAG Guidelines. Under section 105(a)(1), state rules, whether labeled laws or merely guidelines, cannot be enforced—cannot be given the force and effect of law—if they "relat[e] to rates."

The sole issue in this case, therefore, is whether detailed rules specifying what airlines may and may not say when advertising their rates "relat[e] to [those] rates" within the meaning of section 105(a)(1). They do.

B. Summary Of Argument

1. Congress used virtually the same language of preemption in section 105(a)(1) that it had used four years earlier in section 514(a) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1144(a) (1988). In construing the latter pro-

vision, this Court has explained that "[a] law 'relates to' an employee benefit plan, in the normal sense of the phrase, if it has a *connection with or reference* to such a plan." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96-97 (1983) (emphasis added). Similarly, a law "relat[es] to rates," in the normal sense of the phrase, if it has a connection with or reference to rates.

As under ERISA, the Court "must give effect to this plain language unless there is good reason to believe Congress intended the language to have some more restricted meaning." *Shaw*, 463 U.S. at 97. There is none. To the contrary, Congress "reject[ed] more limited preemption language," *Ingersoll-Rand Co. v. McClendon*, 111 S. Ct. 478, 482 (1990), that would have preempted only laws "determining" rates, routes, and services. Other provisions of the statute, preserving the states' ability to exercise certain proprietary rights and to impose certain taxes, were included precisely because Congress understood that it had used broad-sweeping language of preemption.

2. The NAAG Guidelines have an intimate connection with and make explicit reference to the rates airlines charge. Their connection with rates is pervasive and may be demonstrated with a single example. The Guidelines require an advertised fare to be "available in sufficient quantity so as to meet reasonably foreseeable demand on every flight each day . . . for at least three days after the advertisement terminates." U.S. App. 24a. This restriction places a substantive limitation on an airline's ability to determine what fares it will charge and, as the FTC has pointed out, is likely to "reduce the number of discount seats that airlines now offer consumers." App. A, *infra*, at 7a. In addition, the Guidelines are replete with references to rates. Each one of the rules here at issue refers specifically and expressly to the rates charged by air carriers. These are, manifestly, rules "relating to rates" within the meaning of section 105(a)(1).

The states argue that section 105(a)(1) should be read as preempting only "utility-type regulation." *E.g.*, Texas Br. 14. Although such a narrow reading is difficult to square with the literal text of the statute, it is broad enough to doom the NAAG Guidelines. State public utility commissions commonly are responsible for prescribing detailed rules governing the manner in which regulated utilities advertise their rates. *See, e.g.*, 16 Tex. Admin. Code § 23.28(k) (1988). The NAAG Guidelines provide a perfect example of just such utility-type regulation and thus fall well within even the states' own description of what has been preempted.

3. Construing section 105(a)(1) in accordance with its "broad common-sense meaning," *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 739 (1985), best effectuates the deregulatory policy of the statute as a whole. The overriding objective of the Deregulation Act was to replace regulation with the free interplay of competitive market forces. The NAAG Guidelines clash with that objective.

DOT is charged with regulatory responsibility for protecting against unfair and deceptive practices in a manner that also fosters vigorous and effective price competition. The states do not share this dual responsibility, and the rules they have propounded discourage the very efficiency, innovation, and low prices that Congress sought to foster. *See* Deregulation Act § 102(a)(9), 49 U.S.C. § 1302(a)(9).

The NAAG Guidelines arbitrarily prohibit advertising formats that are beneficial to advertisers and consumers alike. By imposing burdensome requirements on advertising content, they are likely to cause a reduction in airfare advertising generally, and especially in the advertising of sharply discounted restricted fares. Because "[a]n airline would have little incentive to reduce fares if it could not advertise them," App. A, *infra*, at 5a, the Guidelines are likely to lead to fewer bargain fares and thus higher

rates overall. *See* App. A, *infra*, at 7a; 54 Fed. Reg. at 31054.

The states of course disagree with the conclusion that the NAAG Guidelines could force prices higher. But they make no secret of the fact that their objective is indeed to work a change in airlines' rates and rate structures. The states hope to pressure air carriers into "dropping the conditions they would otherwise have to disclose or simplifying those conditions in conformance with the NAAG enforcement Guidelines." *Report and Recommendations of NAAG Task Force on Air Travel Industry*, 53 Antitrust & Trade Reg. Rep. No. 1345, at S-6 (Dec. 17, 1987). This objective, of course, is squarely contrary to Congress' purpose in enacting the Deregulation Act. Industry-specific state regulations dictating what airlines can and cannot say when advertising their rates simply have no place in the deregulated, freely competitive marketplace that Congress envisioned. Such regulations "relat[e] to rates" and thus are expressly preempted.

4. Immediately after enactment of the Deregulation Act, the CAB read section 105(a)(1) as its mandate to "occupy the entire field of economic regulations." 44 Fed. Reg. at 9948. When regulatory jurisdiction over the airline industry later was transferred from the CAB to DOT, Congress confirmed the importance of a continuing and exclusive federal jurisdiction, noting in particular that varying state regulations with respect to consumer protection would be "confusing and burdensome to airline passengers, as well as to the airlines." H.R. Rep. No. 793 at 4. DOT responded to this congressional concern by making explicit what previously had been implicit: section 105(a)(1) "dictate[s] that there be one industry-wide price advertisement standard." 54 Fed. Reg. at 31054.

The NAAG Guidelines repudiate the assertion of exclusive federal jurisdiction and defeat the express congressional objective of uniformity. They establish standards in competition and potential conflict with those DOT may adopt; they directly conflict with DOT Order 85-12-68; and they expressly hold out the prospect of non-uniformity and conflict among the states themselves. This is contrary to the express legislative intent that there should be one "legal standard uniform nationwide." *Illinois Corporate Travel, Inc. v. American Airlines, Inc.*, 889 F.2d 751, 754-55 (7th Cir. 1989), *cert. denied*, 110 S. Ct. 1948 (1990).

ARGUMENT

THE NAAG GUIDELINES "RELAT[E] TO RATES" WITHIN THE MEANING OF SECTION 105(a)(1) OF THE DEREGULATION ACT

Section 105(a)(1) of the Deregulation Act precludes enforcement of state rules "relating to [airline] rates." The states argue that section 105(a)(1) does not preempt "general consumer protection laws" that are not "directed at airline practices in particular." Texas Br. 12. That argument misses the point. It is the states' threatened enforcement of the new industry-specific standards contained in the NAAG Guidelines, not the routine enforcement of general consumer protection laws, that gives rise to the question of preemption in this case. The NAAG Guidelines undeniably are directed at airline practices in particular. By their own terms, the Guidelines apply exclusively to "the advertising and marketing practices of the airline industry." U.S. App. 10a.

The NAAG Guidelines establish special rules governing precisely what airlines may and may not say when advertising their rates, routes, and services. In establishing such rules, the Guidelines go far beyond the broad prohibitions of general consumer protection laws. They specify, for example, the restrictions that must be disclosed, and those that need not be disclosed, in various types of advertising; they forbid the use of general cau-

tionary statements such as "restrictions apply;" they dictate the inclusion of various federal taxes and surcharges in the advertised price; they place substantive limitations on the use of such words as "sale;" and they impose other requirements unique to the airline industry. *See* pp. 10-12, *supra*. They even specify the size of type that may be used in disclosing restrictions, *see* U.S. App. 13a, with the admission that "NAAG singled out airline advertisements for this treatment." *Id.* at 15a. The Guidelines thus constitute a detailed regulatory template specifically for the advertising of airfares. By no stretch of the imagination can they be described as general consumer protection laws.

The states' invocation of general law as a basis for enforcing the NAAG Guidelines is a sham. The very statute on which Texas here purports to rely, like the consumer protection statutes of more than twenty other states, specifically cross-references to and incorporates consumer protection standards adopted by the FTC. *See* Tex. Bus. & Comm. Code Ann. § 17.46(c)(1); App. C, *infra*, at 20a. Yet the FTC itself consistently has opposed the Guidelines. *Id.* at 18a-19a. The FTC has pointed out, moreover, that the NAAG report leading to the adoption of the Guidelines "contains virtually no discussion in support of the conclusion that advertising which fails to conform [to the] requirements is unfair or deceptive under state law . . . [and] does not cite a single court decision finding unfairness or deception in the practices the Guidelines would discourage." *Id.* at 19a. NAAG offers no grounds for believing "that the failure of an advertisement to meet a particular requirement would thereby render the advertisement deceptive or unfair even under the broadest state statutory provision." *Id.* at 21a.

These considerations support the charge, leveled by the former Attorney General of New Mexico, Hal Stratton, that NAAG is using general consumer protection

laws as a pretext for subjecting airlines to unlegislated special rules. As Stratton has written, NAAG's members "are using the cover of 'consumer protection' to impose their own anti-business, pro-government-regulation views on the entire nation and are bypassing the legislative process to put in place 'enforcement guidelines' that Congress itself refuses to pass." Hal Stratton, "Attorneys General In Collusion," *Wall St. J.*, June 10, 1988, at 22, col. 4. This effort to engraft industry-specific special rules onto the body of general consumer protection law is unavailing. General law may not be used as protective cover for a state regulatory program that, if enacted separately, would be preempted. *Cf. Chicago & North Western Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 317-18 (1981); *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 243 (1959). States cannot "do indirectly what they could not do directly." *International Paper Co. v. Ouellette*, 479 U.S. 481, 495 (1987).

The narrow issue in this case is whether rules drawn specifically to regulate the manner in which airline rates may be advertised "relat[e] to [those] rates" within the meaning of section 105(a)(1) of the Deregulation Act and thus are preempted. The Court can and should reject the states' invitation to inquire more broadly into whether section 105(a)(1) also preempts general consumer protection rules, such as a prohibition against false statements of fact, that apply equally to all sellers and are not targeted solely at air carriers. "The full scope of the preemptive effect . . . [can] remain[] to be fleshed out on a case-by-case basis." *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 220 (1985). It is sufficient for present purposes to resolve the specific dispute concerning the states' threatened enforcement of the NAAG Guidelines.

To be sure, resolution of this dispute will leave room for disagreement in future cases. For example, a state might promulgate a rule requiring all sellers, and not only air carriers, to caution not just that "restrictions

apply" but that "other substantial restrictions apply." *See* U.S. App. 22a. If the state then sought enforcement only against advertisers of airfares, the situation would be essentially the same as in this case. But if the state in fact sought enforcement against sellers of other products and services, without discriminating against air carriers, it would become necessary to consider whether the Deregulation Act forbids application of a truly general rule of that kind to the advertising of airfares. *Cf. Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 308 n.11 (1988) (distinguishing between general "blue sky" law and industry-specific regulation). But that is not the problem in this case. The states, through their attorneys general, have devised a special set of detailed rules that on their face apply only to the advertising of airfares. The Deregulation Act preempts this deliberate effort by the states to subject air carriers to a unique set of industry-specific rules.

I. THE DEREGULATION ACT HAS THE SAME BROAD PREEMPTIVE SWEEP AS ERISA

"[T]he question whether a certain state action is preempted by federal law is one of congressional intent." *Allis-Chalmers Corp.*, 471 U.S. at 208. Here, the congressional intent to preempt is unequivocal: section 105(a)(1) of the Deregulation Act explicitly bars the states from enacting or enforcing "any law . . . relating to rates, routes, or services of any air carrier." The question in this case, therefore, is not whether Congress intended to preempt, but the scope of the intended preemption.

In determining the scope of preemption under section 105(a)(1), the Court "must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Park 'N Fly, Inc. v. Dollar Park and Fly, Inc.*, 469 U.S. 189, 194 (1985). The language Congress used in section 105(a)(1) is virtually identical to the language it had used four years earlier in section 514(a) of ERISA, preempting state laws that "relate to any employee benefit plan." In construing section 105(a)(1), therefore, it is appropriate to turn to the series of cases in which the Court has construed and applied the ERISA preemption statute.

The Court noted in those cases that where "Congress has expressly included a broadly worded pre-emption provision in a comprehensive statute . . ., our task of discerning congressional intent is considerably simplified." *Ingersoll-Rand*, 111 S. Ct. at 482. The ERISA preemption statute, the Court noted, is "conspicuous for its breadth," *FMC Corp. v. Holliday*, 111 S. Ct. 403, 407 (1990), and "deliberately expansive." *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 46 (1987). The Court concluded that "[t]he phrase 'relate to' [should be] given its broad common-sense meaning, such that a state law 'relate[s] to' a benefit plan . . . if it has a connection with or reference to such a plan." *Metropolitan Life Ins.*, 471 U.S. at 739, quoting *Shaw*, 463 U.S. at 97.

This case is essentially the same. The Deregulation Act is "new, comprehensive legislation which entirely overhauls the aviation regulatory system." H.R. Conf. Rep. No. 1779 at 56. The key to section 105(a)(1), as to the ERISA preemption statute, "is found in the words 'relat[ing] to.'" *Ingersoll-Rand*, 111 S. Ct. at 482. The words "relating to" should be given the same broad common-sense meaning in section 105(a)(1) that they have in ERISA "unless there is good reason to believe Congress intended the language to have some more restrictive meaning." *Shaw*, 463 U.S. at 97. Consistency in construction, giving the same words the same meaning when used in the same way in similar statutes, serves a very practical end: only thus can Congress be assured of achieving the result that it intends to accomplish through its use of those words.

Section 105(a)(1) should be construed consistently with the ERISA preemption statute. There is no good reason to believe that Congress intended the phrase "relating to" to be given a more restrictive meaning in section 105(a)(1) than in ERISA. In the Deregulation Act, as in ERISA, "Congress used those words [*i.e.*, 'relating to'] in their broad sense, rejecting more limited pre-emption language." *Ingersoll-Rand*, 111 S. Ct. at 482. If Congress had intended only limited preemption along the lines that the states now suggest, it would have used language more narrowly tailored to accomplish that result. For example, Congress could have barred the states from "determining" or "regulating" rates, routes, and services. But it deliberately chose not to do so.

The preemption clause contained in the Senate bill did bar the states from "*determining* routes, schedules, or rates, fares, or charges." S. Rep. No. 631 at 39 (emphasis added). But it did not stop there. It proceeded additionally to bar the states from "otherwise promulgat[ing] economic regulations for, any air carrier." *Id.* The Senate bill thus not only barred the states from asserting direct regulatory control over rates, routes, and services but also prohibited them from subjecting air carriers to any other form of economic regulation. That also is the meaning of section 105(a)(1) as enacted. The House simply condensed the two-part Senate provision into the single catch-all phrase "*relating* to rates, routes, and services," without the slightest suggestion that any change in substance was intended. H.R. Conf. Rep. No. 1779 at 4. This understanding of the legislative history was confirmed when, immediately upon enactment, the CAB construed section 105(a)(1) as preempting "the entire field of economic regulations." 44 Fed. Reg. at 9948. *See* pp. 40-41, *infra*.

The states contend that section 105(a)(1) should be read as prohibiting them only from "stepp[ing] into the

breach" left by federal deregulation, *i.e.*, from asserting the specific regulatory powers over rates, routes, and services that were being relinquished by the federal government. Texas Br. 15; 31 States Br. 10. But they offer as support for that contention the section-by-section analysis of a very different earlier bill that did not survive the legislative process; and even that analysis reveals an intention to preempt more broadly than the states are willing to admit. *See* 123 Cong. Rec. 30595-96 (1977). *Amicus* Public Citizen and Aviation Consumer Action Project similarly relies upon the fact that the CAB, when commenting on an even earlier bill, had suggested that a preemption provision similar in wording to section 105(a)(1) would merely "codif[y] . . . existing law." Public Cit. Br. 16, quoting *Aviation Regulatory Reform: Hearings before the Aviation Subcomm. of the House Comm. on Public Works and Transportation*, 95th Cong., 1st Sess. 243 (1977). Those comments on a different and earlier bill—comments diametrically opposed to the CAB's own subsequent construction of section 105(a)(1)—provide no proper guidance to the scope of preemption under the Deregulation Act. It is incontestable that Congress did not mean merely to codify existing law in section 105(a)(1). Both the House and the Senate stated unequivocally that section 105(a)(1) would change existing law; they pointed out, for example, that it would divest the states of their pre-existing regulatory authority over the intrastate activities of interstate air carriers. H.R. Rep. No. 1211 at 15-16; S. Rep. No. 631 at 98-99. Plainly, Congress was doing more than just preventing the states from filling the void left by federal deregulation.

Moreover, the Deregulation Act itself provides internal evidence that preemption was intended to sweep far more broadly than the states now claim. For example, Congress found it necessary to preserve the states' ability to exercise limited "proprietary powers and rights . . . as the owner or operator of an airport." Deregulation

Act § 105(b)(1), 49 U.S.C. app. § 1305(b)(1). Congress similarly found it necessary to preserve the states' ability to impose certain "sales or use taxes on the sale of goods or services." Deregulation Act § 1113(b), 49 U.S.C. app. § 1513(b); *see also Wardair Canada, Inc. v. Florida Dep't of Revenue*, 477 U.S. 1, 7 (1986). Such explicit preservation of state authority would have been unnecessary if the preemption clause were as narrow as the states would have this Court believe.

For all these reasons, section 105(a)(1) should be read, in harmony with the similarly worded ERISA preemption provision, as prohibiting the states from enforcing any rule having a connection with or reference to rates, routes, or services. The NAAG Guidelines fall well within that prohibition.

II. THE NAAG GUIDELINES HAVE A CONNECTION WITH AND REFERENCE TO THE RATES AIRLINES CHARGE

The NAAG Guidelines have an obvious and pervasive connection with the rates airlines charge. The Guidelines represent the states' deliberate regulatory response to the new deregulatory environment mandated by Congress, under which for the first time airfares are competitively determined and competitively advertised. By prescribing what the airlines can and cannot say about their rates, the Guidelines necessarily and directly affect the rates themselves. This point is developed further below. *See* pp. 32-40, *infra*. For present purposes, it is sufficient to furnish a single example.

The Guidelines require an advertised fare to be "available in sufficient quantity so as to meet reasonably foreseeable demand on every flight each day . . . for at least three days after the advertisement terminates." U.S. App. 24a. On its face, this requirement places an explicit substantive limitation on an airline's ability to

determine what rates it will charge. Although the Guidelines permit the airline, as an alternative, to furnish "a clear and conspicuous statement of the extent of unavailability of the advertised fare," they preclude the use of such understandable expressions as "seats limited." *Id.* The net effect of this rule is to restrict an airline's ability to establish and then advertise sharply discounted fares that are available only for a limited time or for a limited number of seats.

The FTC has explained at some length how this requirement of the NAAG Guidelines will inevitably, directly, and adversely affect the rates airlines can charge and the number of seats they are able to make available at those rates:

> This requirement could substantially reduce the number of discount seats that airlines now offer consumers. Airlines currently employ extremely sophisticated computer programs to allocate fares on a flight-by-flight, day-by-day basis under "yield management" systems designed to ensure that each flight takes off with as many seats filled as possible. Under this system, airlines continuously analyze the demand for seats on each flight and alter the mix of different fares in order to fill the flight. The number of seats available at different fares can change up to the departure of the flight. As a result, the number of seats allocated at a particular discount fare may be taken 10 days before a flight, but cancellations or a change in demand may result in additional discount seats becoming available two days before departure. Similarly, seats on flights departing at off-peak times may be offered at deeper discount fares in order to attract more customers. Moreover, fare adjustments are also made in order to meet competition from other airlines.
>
> The complexity of the yield management pricing system is virtually impossible to explain in advertising. The flexibility to respond to demand by adjust-

> ing prices to fill each flight would be lost under the more static seat allocation program the task force's guidelines could impose. Depriving airlines of the necessary flexibility to offer deeply discounted fares will raise the cost of airline service while significantly restricting consumers' access to low fare air travel.

App. A, *infra*, at 7a-8a (footnote omitted); *see also* App. B, *infra*, at 14a-15a.

Considerations such as these led DOT to conclude that the overall "effect of the Guidelines would be to materially diminish the ability of airlines to advertise discount restricted fares." App. B, *infra*, at 13a. Sharply reduced fares that cannot be effectively advertised will not serve their purpose of attracting marginal customers who otherwise would not travel or would travel by some other means or carrier. The natural consequence will be to discourage airlines from offering these fares at all: "[a]n airline would have little incentive to reduce fares if it could not advertise them." App. A, *infra*, at 5a. The Guidelines' connection with rates, therefore, is manifest.

The NAAG Guidelines also have reference to rates and, specifically, to the rates charged by air carriers. This distinguishes the Guidelines from general rules of consumer protection that do not target the sellers in a single industry. *Cf. Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825 (1988) (distinguishing between a state anti-garnishment statute narrowly tailored to govern pension benefits and a state garnishment statute of general applicability). The Guidelines themselves are replete with references specifically to airfares. Each one of the eight rules here at issue expressly refers to airline rates. *See* pp. 10-12, *supra*.

This case is, in this respect, very much like *Ingersoll-Rand*. There, a state common law rule had permitted a terminated employee to recover for wrongful discharge if

he could show that his employer was motivated by a desire to avoid contributing to or paying benefits under a benefit plan. 111 S. Ct. at 481. This did not directly interfere with the employer's decisions concerning whether to have a plan, what the terms of the plan would be, or how it would be administered. *Id.* at 484. But because the state rule directly referred to benefit plans and made the existence of a plan central to recovery, it was preempted by ERISA. *Id.* at 483. The NAAG Guidelines similarly depend on the existence of and explicitly refer to airfares. The Guidelines are, indeed, single-mindedly focused on what airlines can and cannot say about their rates. They have reference to almost nothing but rates.

In short, as the Fifth Circuit correctly concluded, "[i]t cannot be gainsaid that enforcement of a state law regulating fare advertising by airlines has a connection with or reference to rates." Pet. App. 33a. Because the NAAG Guidelines have an intimate connection with and make explicit reference to rates, they "relat[e] to" rates within the plain meaning of section 105(a)(1).

The states argue, however, that Congress intended to preempt only "utility-type regulation," *see, e.g.*, Texas Br. 14, a phrase they borrow from testimony given by a CAB official during a legislative hearing on the bill. *See* 31 States Br. 14. Such a narrow reading is difficult to square with the plain meaning of the statutory text. Be that as it may, the Guidelines could not pass muster even under the states' proposed standard of preemption. Whatever else "utility-type regulation" may mean, it surely encompasses industry-specific regulation of the type characteristically imposed by state public utility commissions; and those commissions commonly are responsible for prescribing rules governing the manner in which regulated utilities advertise their rates. For example, the Texas Public Utility Commission has promulgated regulations governing the advertising of promotional rates by local exchange carriers, requiring that such advertising

"shall clearly describe the temporary nature of the rate, the date on which the promotional rate will expire, and the rate which will apply after expiration of the promotional rate." 16 Tex. Admin. Code § 23.28(k) (1988). This is precisely the kind of detailed control over advertising that the states are seeking to exert through enforcement of the NAAG Guidelines. The NAAG Guidelines therefore not only have a connection with and reference to airline rates but also furnish a perfect example of the kind of utility-type regulation that the states themselves concede section 105(a)(1) preempts.

The states' counter-argument that section 105(a)(1) and the savings provision, section 1106, "must be read together," Texas Br. 14, is an obvious makeweight. Reading those statutes together does not assist the states. Section 105(a)(1), the later-enacted provision, "is a clear indication of congressional intent to preempt and is controlling." *O'Carroll v. American Airlines, Inc.*, 863 F.2d 11, 13 (5th Cir.), *cert. denied*, 490 U.S. 1106 (1989). Indeed, it is by no means clear that section 1106, which was enacted in 1938 to save those state remedies "now existing," would have any application at all to newly devised rules like the NAAG Guidelines. But whatever breadth section 1106 may have had previously, it now acts to preserve only those state remedies that section 105(a)(1) does not preempt, *i.e.*, remedies *not* "relating to rates, routes, or services." The NAAG Guidelines, which do "relat[e] to rates" even under the standard proposed by the states, fall well within the ambit of section 105(a)(1) and thus are beyond the reach of section 1106.

III. THE NAAG GUIDELINES RUN COUNTER TO THE DEREGULATORY POLICY OF THE STATUTE AS A WHOLE

In determining the scope of preemption under section 105(a)(1), it is appropriate to "'"look to the provisions of the whole law, and to its object and policy."'" *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 221 (1986), quoting *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 285 (1956), in turn quoting *United States v. Heirs of Boisdore*, 8 How. 113, 122 (1849). That inquiry confirms that section 105(a)(1)'s "pre-emptive scope [is] as broad as its language." *Shaw*, 463 U.S. at 98. Giving section 105(a)(1) its "broad common-sense meaning," *Metropolitan Life Ins.*, 471 U.S. at 739, best effectuates the deregulatory policy of the statute as a whole.

The overriding objective of the Deregulation Act was to replace regulation with the free interplay of competitive market forces and thereby "allow competition and the marketplace to determine rates and practices in the air transport industry." *Arkwright-Boston Mfrs. Mut. Ins. Co. v. Great Western Airlines, Inc.*, 767 F.2d 425, 427 (8th Cir. 1985). This message comes over loud and clear both in the statutory text and in the legislative history. The declaration of congressional policy, in section 102(a)(4) and (9), calls for the "placement of maximum reliance on competitive market forces and on actual and potential competition" and for "development, and maintenance of an air transportation system relying on actual and potential competition to provide efficiency, innovation, and low prices, and to determine the variety, quality, and price of air transportation services."

The congressional objective was accomplished, in the main, by withdrawing from the CAB its historic authority to determine rates and approve routes. The CAB was instructed, instead, "to allow prices, route structures, and the nature and variety of air services to be set by the independent forces of the free market and airline management decisions, rather than by the Board itself." S. Rep. No. 631 at 5. Congress sought to ensure that "price competition will be a permanent reality in domestic air transportation." *Id.*

At the same time, Congress recognized that it was incumbent on the federal government to safeguard the integrity of those market forces on which maximum reli-

ance was being placed. Referring implicitly to the CAB's existing authority under section 411(a) of the FAA Act to protect against "unfair or deceptive practices or unfair methods of competition," Congress reemphasized in section 102(a)(3) and (7) of the Deregulation Act that the CAB had a duty to prevent "unfair or deceptive practices" and "unfair, deceptive, predatory, or anticompetitive practices in air transportation." The CAB was armed with authority not only to issue orders to cease and desist but also to impose civil penalties and seek imposition of criminal sanctions. *See* FAA Act §§ 901 and 902 (codified as amended, 49 U.S.C. app. §§ 1471 and 1472).

Regulatory jurisdiction over the airline industry passed from the CAB to DOT in 1984. *See* section 3(b) of the FAA Act (codified as amended, 49 U.S.C. app. § 1551(b)). Like the CAB before it, DOT is charged with the dual responsibility of freeing the airlines from nonmarket constraints while at the same time protecting consumers against unfair and deceptive practices. This means that DOT must exercise its authority over consumer protection in a manner that remains sensitive to the important objective of encouraging efficiency, innovation, and low prices through maximum reliance on competitive market forces. Consequently, in determining whether a particular practice is unfair or deceptive DOT gives careful consideration to the economic forces at work in the airline industry, and it attempts to avoid "placing any restrictions on the industry that are not necessary and that would tend to limit airline price competition." 54 Fed. Reg. at 31053. This reflects the correct understanding that robust price advertising is essential to effective price competition. *See, e.g., Bates v. State Bar*, 433 U.S. 350, 577 (1977); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 769 (1976).

DOT's regulation of airfare advertising is responsive to the fact that the economics of a competitive airline industry dictate the adoption of complex and flexible pric-

ing structures. Airlines face economic constraints that are quite different from those encountered in most industries. Air carriers have very high fixed costs, and even their variable costs (such as fuel) are rarely directly attributable to any one class of service or passenger. Transportation Research Board National Research Council, *Winds of Change: Domestic Air Transport Since Deregulation* 89-92, 135 (1991). As a consequence, the marginal cost of carrying an additional passenger is negligible, even though the average cost may be quite high. *Id.* at 94-95. Moreover, most carriers operate with substantial excess capacity overall but may face heavy demand for some flights or during particular times of the year. *Id.* at 92-97. Business travelers typically have a need for air travel that is relatively insensitive to price but highly sensitive to scheduling constraints and the availability of seats on short notice. *Id.* Nonbusiness travelers, on the other hand, typically are more concerned about price but also are more flexible with respect to scheduling. *Id.*

All of these factors play a role in determining airfares. Airlines seek to recover their costs by implementing a multi-tier pricing structure, pursuant to which higher fares are charged to travelers with an inelastic demand for air travel and lower fares are charged to other travelers in order to fill seats that otherwise might remain empty. *Id.* Such a pricing structure is achieved by imposing restrictions on lower-priced tickets that make them less attractive or even unavailable to customers who need, for example, to travel on short notice, or on a particular day, or at a particular time. *Id.* By offering a variety of fares, each accompanied by a particular set of restrictions, airlines attempt to maximize revenues in relation to their relatively fixed operating costs. *Id.*

Lower fares, to serve their purpose of attracting passengers to fill otherwise empty seats, must be advertised. This poses a practical problem. The proliferation of fares and accompanying restrictions makes it difficult to convey the full complexity of the fare structure in an adver-

tisement that remains both short and understandable. Recognizing this difficulty, DOT has sought to strike an appropriate balance, permitting advertising formats appropriate to the economic realities of the airline industry while at the same time assuring that consumers will not be deceived. The moral imperatives of the NAAG Guidelines threaten to upset this balance. They discourage the very "efficiency, innovation, and low prices" that Congress sought to foster. *See* Deregulation Act § 102(a)(9) of the Act, 49 U.S.C. app. § 1302(a)(9).

The NAAG Guidelines insist that "[a]ny . . . tax, or other surcharge . . . must be included in the total advertised price of the fare." U.S. App. 26a. In contrast, DOT's proposed regulation, enlarging upon Order 85-12-68, would permit airlines to advertise fares net of "U.S. and foreign departure taxes, security charges, customs fees, immigration fees," and other similar government-imposed or government-approved surcharges. 54 Fed. Reg. at 31055. DOT has explained that requiring each airline to advertise a single fare that included all taxes and other related charges would "tend to limit airline price competition," because "[t]he specific charges that would be permitted to be listed separately either are limited, or apply only in certain markets or for certain flights, thus making it difficult or impossible to publi[s]h advertisements with one way and round-trip fares to multiple destinations and include charges in single advertised rates." *Id.* at 31053. This problem would become acute with the implementation of new federally-approved passenger facility charges of up to $3 per airport. *See* 56 Fed. Reg. 24254 (1991). Such charges alone can make a round-trip fare vary by as much as $12, depending on the airports used. *Id.*

In addition, the NAAG Guidelines require advertisement of "the full round-trip fare." U.S. App. 27a. DOT, on the other hand, would permit "[o]ne-way fares that are available as part of a round-trip purchase [to] be advertised separately." 54 Fed. Reg. at 31055. DOT's proposal is "consistent with existing practice which the Department has not found to have caused any confusion in the past." *Id.*

Beyond these two specific differences between DOT's proposals and the NAAG Guidelines, there is a fundamental difference in philosophy. DOT recognizes that an advertisement is not a contract but an invitation to do business. Both DOT and the FTC understand that "[t]he goal of most advertising for discount airfares is to signal that bargain prices are available and suggest that consumers inquire further when they contact a travel agent or airline to make specific travel plans." App. A, *infra*, at 5a. They believe that advertisements need not "describe every contractual restriction or limitation," that it is sufficient "to alert the customer that certain important kinds of restrictions and limitations exist." App. B, *infra*, at 14a; *see also* App. C, *infra*, at 22a. In contrast, "the Guidelines would, in effect, force carriers to place their extensive and detailed contracts of carriage in advertisements." App. B, *infra*, at 13a. The Guidelines require newspaper and magazine advertisements to advise the consumer of almost every conceivably relevant restriction in detail, even though it traditionally has been the responsibility of travel agents or airline reservation agents to provide such particularized assistance. App. A, *infra*, at 6a-7a. As the FTC has pointed out, "[a]dvertising restrictions such as those . . . would make it very costly to advertise present fare structures in print." *Id.* at 5a.

The NAAG Guidelines' onerous demands are likely to lead to a decrease in overall airfare advertising and, in particular, in the advertising of discounted fares. *See* J.A. 56a, 58a; App. B, *infra*, at 13a. Indeed, there already is evidence that "some airlines have reduced or eliminated their advertising of discount fares on television because of the disclosure requirements of the Guidelines."

App. C, *infra*, at 19a. Inability to advertise effectively will severely impair airlines' ability to offer the complex and flexible fare structure that the economics of the newly deregulated airline industry demand. As one airline marketing executive has warned, "the inhibitions placed on price advertising by the states could actually inhibit the availability of innovative or discount fares designed to attract the most price-sensitive travelers." J.A. 90a.

In short, the NAAG Guidelines impair airlines' ability to establish fares and fare structures that reflect and respond to competitive market forces. Indeed, the states make no secret of the fact that they intend directly to affect "the terms and conditions of discount airline fares as well as the advertising of those fares." App. C, *infra*, at 24a. The states acknowledge that, by requiring elaborate specification of applicable travel restrictions, they hope to pressure the airlines into "dropping the conditions they would otherwise have to disclose or simplifying those conditions in conformance with the NAAG enforcement Guidelines." *Report and Recommendations of NAAG Task Force on Air Travel Industry*, 53 Antitrust & Trade Reg. Rep. No. 1345, at S-6 (Dec. 17, 1987). The states presumably expect the airlines nonetheless to continue to offer the same attractively low fares to which those conditions had been attached. In the same vein, by requiring all taxes and surcharges to be included in the total advertised fare, the states intend to focus consumers' attention on that higher total, presumably with the hope that competition will then drive the total price down to the level of the presently advertised net fares. The states also may hope that by standardizing the advertising of airfares they can force the standardization of the fares themselves, even though this would inhibit the innovation that Congress intended to foster. In these various ways the NAAG Guidelines constitute deliberate intermeddling with competitive airline pricing strategies—an intermeddling that obviously runs counter to the express statutory

policy of deregulation and stands in various ways "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941); *see also Transcontinental Gas Pipe Line Corp. v. State Oil & Gas Bd. of Miss.*, 474 U.S. 409, 423 (1986) (state law requiring natural gas to be purchased ratably is preempted by federal statute allowing price to be determined by market forces).

Consequently, there is no room here for the "strong presumption against finding preemption" on which the states rely. 31 States Br. 8. The central purpose of the *Airline Deregulation* Act, as its very name indicates, was to relieve airlines from burdensome federal and state regulation. There obviously can be no presumption against finding that the Act bars enforcement of newly formulated state rules specifically designed to regulate airlines. Moreover, although a presumption against preemption may serve as a guide to construing statutes that do not speak to the question, it can have little force where, as here, the statute itself expressly preempts. *Cf. English v. General Electric Co.*, 110 S. Ct. 2270, 2275 (1990).

Even in cases involving only implied preemption, the presumption urged by the states is not allowed to undermine clear federal statutory objectives. This is amply illustrated by the Court's decision in *Schneidewind*, where the State of Michigan sought to regulate the issuance of securities by the operator of a natural gas pipeline—a regulatory power that the Federal Energy Regulatory Commission ("FERC") lacks. *See* 485 U.S. at 309. This Court reasoned that in view of the close linkage between a firm's capital structure and the rates it can charge, the state's effort to regulate the issuance of securities constituted the indirect regulation of rates. *Id.* at 308. Such state regulation, the Court concluded, is preempted by the comprehensive scheme of federal regulation pursuant to which FERC sets rates. *Id.* at 300.

It is instructive to compare the instant case with *Schneidewind*. The detailed regulation of rate advertis-

ing, like the regulation of securities issuance, necessarily and directly bears upon rates themselves. But unlike FERC, DOT has express regulatory authority, pursuant to section 411(a) of the FAA Act, over the very matters the states seek to regulate in this case. And here the issue is one of express and not, as in *Schneidewind*, merely implied preemption. The presumption urged by the states, which was unavailing in *Schneidewind*, *a fortiori* is unavailing here. Industry-specific state regulations dictating the format and content of airfare advertising simply have no place in the freely competitive marketplace envisioned by Congress when it enacted the Deregulation Act.

IV. THE NAAG GUIDELINES DEFEAT BOTH THE AVOWED FEDERAL INTENTION TO OCCUPY THE FIELD AND THE EXPRESS CONGRESSIONAL OBJECTIVE OF UNIFORMITY

Immediately after enactment of the Deregulation Act, the CAB read section 105(a)(1)'s explicit preemption of state law as a mandate to "occupy[] the entire field of economic regulations." 44 Fed. Reg. at 9948. Reviewing the legislative history, the CAB concluded that preemption was designed both "to prevent State economic regulation from frustrating the benefits of decreased Federal regulation" and to "prevent conflicts and inconsistent regulations.'" *Id.* at 9949, quoting H.R. Rep. No. 1211, 95th Cong., 2d Sess. 16 (1978). The effect of preemption, taken together with the CAB's new responsibilities under the Deregulation Act and its continuing authority under the FAA Act, was to bestow upon the CAB "economic regulatory responsibility for all operations of carriers with Federal authority to the exclusion of the States." *Id.* The CAB therefore stated its intention to "exercise sole and complete regulatory jurisdiction over all federal carriers' operations." *Id.* at 9950.

The CAB did not attempt to define more precisely the extent of its exclusive regulatory jurisdiction. Nor did

it attempt to catalog all areas of possible state regulation that it believed to be preempted. Instead, it promulgated a new regulation which recited the terms of section 105(a)(1) and added that "[e]xamples of regulatory actions preempted under this section include, but are not limited to, tariff filing, certification, regulations governing flight frequency, mode of operation, in-flight amenities, liability, insurance, bonding, and capitalization." 14 C.F.R. § 399.110(d) (1990). In the regulatory preamble, the CAB explained why state regulation of such matters as insurance, bonding, and capitalization was preempted:

> [R]egulation of capital structure, minimum insurance requirements, bonding, etc. motivated by a desire to protect the quality of service is included with the preemption imposed in section 105. Such regulations necessarily involve a balancing of such considerations as the need to assure carriers' financial integrity and further other goals of consumer protection, and at the same time, to reduce the barriers to entry and encourage competition. Such balancing is essential to the success of deregulation and reliance on the free market, and it is specifically within the Board's province. For states to impose different requirements would interfere with the federal deregulation program both by imposing different priorities than those selected by the Board and by creating confusing multiple regulations of the same subject matter.

44 Fed. Reg. at 9951.

The CAB's discussion of these matters is significant in at least three respects. *First*, the CAB clearly understood that the preemption of state laws "relating to rates, routes, or services" sweeps broadly and is not limited solely to laws that directly determine rates, routes, or services. For example, if indeed the CAB considered federal preemption to embrace only "utility-type regulation," *see* 31 States Br. 14, its treatment of insurance, bonding, and capitalization reveals that its view of what consti-

tutes such regulation was very different from that now advanced by the states. *Second*, the CAB also understood that the scope of federal preemption must be determined by reference to the statutory objective of deregulation. Matters such as insurance, bonding, and capitalization are beyond the reach of state regulation because of the close relationship they bear to an airline's ability to charge certain rates or to offer certain routes and services in the newly deregulated economic environment. The same close relationship exists in the case of airfare advertising. *See* pp. 32-40, *supra*. Third, the CAB explicitly recognized that state efforts to impose requirements relating to insurance, bonding, and capitalization in the name of "consumer protection"—efforts that prefigured the requirements relating to advertising imposed by the NAAG Guidelines—interfere with the federal deregulation program and thus are preempted.

The states take comfort from the fact that the CAB did not specifically mention state regulation of airfare advertising. 31 States Br. 14. That omission, however, is neither surprising nor significant. Because of the prior absence of price competition in the airline industry, airfare advertising had been of little importance and, as of 1979, had attracted virtually no regulatory attention. Nor is it significant that the CAB, when staking out its claim to exclusive regulatory jurisdiction, made no specific reference to its authority over unfair and deceptive practices pursuant to section 411(a) of the FAA Act. That authority, which is conferred by the subchapter of the FAA Act captioned "Air Carrier Economic Regulation," is unambiguously included within "the entire field of economic regulation." 44 Fed. Reg. at 9948. It obviously represents a significant feature of federal "regulatory jurisdiction over . . . [air] carriers' operations." *Id.* at 9950.

Texas contends that the CAB later "expressed its opinion that the states are not preempted from regulating

advertising." Texas Br. 22 n.12. This is a reference to a memorandum prepared by the General Accounting Office, stating that "it is unclear whether the Congress intended preemption to extend to enforcement of broad consumer protection statutes regarding consumer complaints arising from air transportation services" and reporting, in the nature of unattributed hearsay, that "CAB suggests that such enforcement would not be preempted." General Accounting Office, *Report to the Chairman, Subcommittee on Investigations and Oversight, House Committee on Public Works and Transportation*, GAO/RCED-84-154, App. I at 7 (June 13, 1984). But such consumer complaints about services do not implicate federal authority over unfair and deceptive practices. The hearsay on which the states rely thus has nothing to do with this case. Certainly the CAB never suggested that the Deregulation Act permits the states to impose industry-specific guidelines dictating precisely what airlines can and cannot say when advertising their rates.

When Congress enacted the Sunset Act in 1984, transferring regulatory jurisdiction from the CAB to DOT, it stressed the importance of maintaining an exclusive, federal "uniform system of regulation" with respect to unfair and deceptive practices in the airline industry. H.R. Rep. No. 793 at 4. Congress expressed concern that regulations which "var[ied] from state to state . . . would be confusing and burdensome." *Id.* Indeed, Congress was so concerned with ensuring uniformity and preventing the imposition of conflicting standards that it rejected suggestions that DOT might share its authority for consumer protection with the FTC, explaining that such "overlapping authority" would be "confusing and inefficient." *Id.* at 6. Subsequently, in the exercise of its exclusive authority, DOT has responded to these congressional concerns by making explicit what already had been implicit under the CAB: section 105(a)(1) of the Deregulation Act "dictate[s] that there be one industry-

wide price advertisement standard." 54 Fed. Reg. at 31054.

In short, both the CAB, acting under the FAA and Deregulation Acts, and DOT, acting under those statutes and the Sunset Act, have undertaken to occupy the field of economic regulation, specifically including the regulation of price advertising, and they have done so with the blessing and active encouragement of Congress. The NAAG Guidelines simply do not fit into this scheme. The Guidelines represent an intrusion by the states into a field that already has been staked out as an exclusively federal domain. This intrusion cannot be tolerated under the Supremacy Clause.

The NAAG Guidelines offend, in at least three separate and significant ways, the principle of uniformity that Congress was so intent upon preserving. *First*, by their very existence the Guidelines represent the assertion of "overlapping authority." H.R. Rep. No. 793 at 6. The Guidelines establish a set of standards in competition and potential conflict with those that DOT has proposed or may adopt. Indeed, there is an "imminent possibility" of direct conflict, *Schneidewind*, 485 U.S. at 310, for the pending DOT rulemaking proposes two rules that flatly contradict requirements established by the Guidelines. *See* pp. 36-37, *supra*. Moreover, the general philosophy of the Guidelines, which is to prescribe detailed rules for every facet of airfare advertising, is so contrary to the spirit of the Deregulation Act and to the regulatory philosophy of DOT that innumerable additional conflicts may be foreseen for the future.

Second, the NAAG Guidelines are in actual and direct conflict with DOT Order 85-12-68. Whereas that order expressly "permit[s] the exclusion of the U.S. international departure tax from the total advertised price," J.A. 37a-38a, the Guidelines are precisely contrary. They require that "[a]ny . . . tax . . . must be included in the total advertised price of the fare." U.S. App. 26a. Although the states seek to minimize this conflict by contending that Order 85-12-68 is procedurally invalid, 31 States Br. 24, the order in fact has never been challenged.

Third, in addition to posing actual and potential conflicts between federal and state law, the NAAG Guidelines expressly hold out the further prospect of nonuniformity and conflict among the states themselves. The Guidelines are explicitly made "subject to the exercise of . . . individual prosecutorial discretion, and variations or supplementations" by the separate states. U.S. App. 7a. This indicates that some states may try to enforce their own customized versions of the Guidelines, creating the possibility of multiple and conflicting industry-specific state rules governing the advertising of airfares. The imposition of onerous double or multiple standards would be intolerable in an industry that relies so heavily on interstate media in advertising its prices. As the FTC correctly pointed out in opposing adoption of the NAAG Guidelines, airfare advertising has a "uniquely interstate nature." App. A, *infra*, at 3a. Conflicting state rules would make "it virtually impossible to put together nation-wide advertising programs that accurately portray the price of [the airlines'] services." 54 Fed. Reg. at 31054.

"In reducing federal economic regulation of the field to allow the forces of free competition to rule the marketplace, Congress obviously did not intend to leave a vacuum to be filled by the Balkanizing forces of state and local regulation." *New England Legal Found. v. Massachusetts Port Auth.*, 883 F.2d 157, 173 (1st Cir. 1989). Congress did not intend its deregulation of the airline industry to "be interpreted as an invitation to the States to impose additional regulations." *Transcontinental Pipeline*, 474 U.S. at 423. "Section [105(a)(1)] insures that the prices at which [airline ticket] sales occur to consumers, and the accompanying advertising, can proceed

under a legal standard uniform nationwide." *Illinois Corporate Travel*, 889 F.2d at 754-55. The states have not been left free to promulgate new regulations that would put airlines into straitjackets—indeed, into multiple and possibly conflicting straitjackets—concerning what they lawfully can and cannot say about their rates.

CONCLUSION

The judgment should be affirmed.

Respectfully submitted,

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APPENDICES

APPENDIX A

[SEAL]
Office of the Secretary

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

October 1, 1987

Mr. Christopher M. Ames
Deputy Attorney General
Office of the Attorney General
Department of Justice
350 McAllister Street, Room 6000
San Francisco, California 94102

Dear Mr. Ames:

On September 10, 1987, Attorney General William L. Webster, Chairman of the Consumer Protection Committee of the National Association of Attorneys General, invited the Commissioners to comment on the September 2 draft of enforcement guidelines prepared by NAAG's task force on the air travel industry. He asked that comments regarding the "substance, form, effect, [and] unintended results" of the proposal be forwarded to you by September 30, 1987. Although the limited time available does not permit a comprehensive analysis of all the issues thus presented, the Commission is pleased to offer its general comments on some of the essential features and important consequences of the proposed enforcement policy.

With these draft guidelines, the task force is considering recommending that NAAG adopt specific regulatory schemes for three areas of the air travel industry. First, the guidelines would require all advertisements of fares to disclose prominently all material conditions connected with the purchase of tickets and require that airlines make available a sufficient number of seats on each flight to meet reasonably anticipated demand for any advertised

fare. Second, the guidelines would regulate some terms and conditions of frequent flier programs. Third, the guidelines would require disclosure of all terms and conditions of incentives offered to induce passengers to surrender their seats on over-booked flights.

For the reasons explained below, the Commission recommends that the task force refrain from recommending these draft guidelines.

The Commission is seriously concerned that the remedies contemplated in the guidelines, especially the advertising provisions, could have the unintended consequence of substantially inhibiting effective price competition among the airlines. In addition, the draft guidelines might result in inconsistent federal and state regulation. Rules such as those in the current proposals could reduce the estimated $10 billion of annual benefits—in lower fares and more flights—that are flowing from deregulation.[1] Unless the task force has evidence indicating that airline fare advertising, frequent fiier programs, or overbooking compensation policies are generally unfair or deceptive, the legal and factual bases for the draft guidelines are not clear. All of these issues deserve careful consideration prior to adoption of these guidelines.

The Commission is well aware of reports that the dramatic increase in air travel has resulted in problems. A recent surge of complaints—primarily concerning late flights, lost baggage, slow refunds, and poor service—has commanded wide publicity, as well as the attention of both the Congress and the Department of Transportation. These complaints have accompanied, and in large measure appear to reflect, the rapid growth of

[1] S. Morrison & C. Winston, The Economic Effects of Deregulation 1 (1986). The authors' estimate of these benefits, which are given in 1977 dollars, have been converted to 1986 dollars.

air travel spurred by deregulation.[2] However, the problems consumers have encountered do not appear to stem from the advertising and marketing practices these guidelines address. Recent DOT complaint statistics indicate that barely one percent of the complaints DOT receives involve advertising.[3] Despite this small percentage of complaints, the task force guidelines would impose substantial barriers to price advertising which is critical to competitive pricing and low fares.

Finally, the task force's proposal ignores the important question of federal preemption. The Federal Aviation Act specifically preempts state regulation of airline rates, routes or services.[4] Some portions of the guidelines would appear to regulate rates and services indirectly, or at least have a substantial impact on them. Moreover, the guidelines as a whole ignore the uniquely interstate nature of the advertising at issue. The Department of Transportation already regulates airline advertising under section 411 of the Federal Aviation Act, which generally prohibits unfair or deceptive acts or practices. Under this authority DOT reports that it has already taken informal action to correct questionable advertisements[5] and, in addition, maintains a consumer affairs office to resolve individual consumer complaints, including complaints about advertising. In light of DOT's active

[2] According to the Department of Transportation, air travel has increased by over 50% since 1977, based on "enplanement" data accumulated by DOT.

[3] Department of Transportation, Air Travel Consumer Complaint Report, June and Year-to-Date 1987.

[4] 49 U.S.C. § 1305(a)(1) (1978).

[5] Testimony of Matthew Scocozza, Assistant Secretary for Policy and International Affairs, U.S. Department of Transportation, Before the House Subcommittee on Aviation, Committee on Public Works and Transportation (June 9, 1987).

regulatory presence, the guidelines would impose duplicative and often inconsistent requirements.[6]

Section 1—Fare Advertising

Under this section every "restriction, limitation or other requirement which in any way affects the use or refundability" of an airline ticket must be prominently disclosed in all advertising of airline fares—whether print, radio, or television. The guidelines, by way of example, specifically list 13 separate types of restrictions that must be disclosed. In print ads disclosures must be made in 10 to 14 point type either adjacent to the fare price or in a box with the heading "Restrictions and Limitations." In television and radio ads, the same disclosures must be made orally in the "same pace and volume as the fare information."

The Commission has long recognized that omission of material information can make an advertisement or representation unfair or deceptive.[7] The Commission has been equally cognizant that this principle must be interpreted in a manner that will not stifle truthful advertising.[8] But the extensive disclosure requirements the task force has proposed could severely curtail the price advertising in this industry. As is true in other industries,[9] advertising has been a primary source of price

[6] We are aware of one state lower court decision upholding state regulation of airline advertising. That decision specifically reserved the issue of whether the state regulation had more than an incidental impact on airline rates. By contrast, the impact of the proposed guidelines would seem substantial. People v. Western Airlines, Inc., 155 Cal.App.3d 597, 202 Cal.Rptr. 237 (Cal. Ct. App. 1984).

[7] *See, e.g.*, International Harvester Co., 104 F.T.C. 949, 1055-62 (1984).

[8] *See, e.g.*, International Harvester Co., 104 F.T.C. 949, 1062 (1984); ITT Continental Baking Co., 83 F.T.C. 865, 965 (1973).

[9] *See, e.g.*, J. Cady, Drugs on the Market: The Impact of Public Policy on the Retail Market For Prescription Drugs (1975); W. Jacobs *et al.*, Staff Report on Consumer Access to Legal Services: the Case For Removing Restrictions on Truthful Advertising

competition in the airline industry. The beneficiaries of aggressive advertising and competition are consumers. Advertising restrictions such as those that are contemplated in these guidelines would make it very costly to advertise present fare structures in print and all but impossible to do so on radio and television. Fifteen, thirty and sixty second commercials do not allow lengthy recitals of contract terms and conditions, yet are an important means of ensuring price competition. An airline would have little incentive to reduce fares if it could not advertise them. We urge NAAG not to take any action which will deprive consumers of the net benefits of fare advertising by airlines.

Advertising is seldom an appropriate vehicle for disclosing all material characteristics of a product or service. Consumers do not rely on advertising of this type to make a final purchase decision, and it does not serve that function. The goal of most advertising for discount airfares is to signal that bargain prices are available and suggest that consumers inquire further when they contact a travel agent or airline to make specific travel plans. Requiring too much information in ads can have the paradoxical effect of stifling the information that consumers receive. The Commission has recognized this in many other contexts. For example, in 1973 the Commission declined to require certain disclosures sought by the staff, recognizing that the disclosures sought would be "tantamount to a *de facto* ban on . . . advertising through the radio and TV media."[10] In 1979, the Commission rejected a staff proposal to require detailed disclosures of the conditions affecting a particular savings claim. Citing concerns about discouraging savings claims, the Com-

(1984); Kessides, Advertising, Sunk Costs and Barriers To Entry (1983); 15 Benham, *The Effects of Advertising on the Price of Eyeglasses*, 4 J.L. & Econ. 337 (1972); Steiner, *Does Advertising Lower Consumer Prices?* J. of Marketing, Oct. 1973, at 19.

[10] ITT Continental Baking Co., 83 F.T.C. 865, 965 (1973).

mission adopted a provision simply requiring a general disclosure that more detailed information was available.[11] A similar approach was adopted in the Commission's recent revision of its Guides Against Deceptive Advertising of Guarantees, where the Commission was again concerned that detailed disclosure requirements had discouraged useful advertising. The revised guides provide for a general disclosure that the full terms of the warranty are available prior to sale.[12]

There is probably even less reason for imposing detailed disclosure requirements in the airline industry than in the industries where the Commission has already rejected them. At least 75 percent of all airline tickets are now purchased through travel agents,[13] who are knowledgeable about the various conditions that apply to dis-

[11] In its Statement of Basis and Purpose for the Commission's Trade Regulation Rule on Labeling and Advertising of Home Insulation, the Commission said:

> [Savings] claims are designed to persuade consumers to purchase the products. Yet, because so many factors affect the savings achieved by an individual homeowner, any savings claim is untrue with respect to many consumers. . . .
>
> Instead of the approach suggested by the staff, the Commission has adopted a much simpler and far less burdensome disclosure provision. This provision is based on the conclusion that, to remedy the deception inherent in savings claims, consumers must be told that savings depend on many factors, and what those factors are. Since a disclosure containing all of this information would be lengthy, however, section 460.1(b) of the Rule simply requires a brief statement that savings vary and a reference to the fact sheets for further information.

44 Fed. Reg. 50218, 50234 (1979).

[12] 50 Fed. Reg. 18621 (1985).

[13] Testimony of Matthew Scocozza, Assistant Secretary for Policy and International Affairs, U.S. Department of Transportation, Before the House Subcommittee on Transportation, Tourism, and Hazardous Materials, Committee on Energy and Commerce (May 19, 1987).

count fares. Full disclosure of all restrictions also can be obtained by direct ticket purchasers by calling the airline. Based on the information we have seen to date, it seems better for consumers that airlines remain free to make only general disclosures.

Other provisions of Section 1 raise similar concerns.[14] The most troubling of these remaining provisions is Section 1.7, which requires that any advertised fare must be available in sufficient quantity so as to meet reasonable demand on every flight. If such fares are not available, the advertisement must disclose two specific restrictions in accordance with earlier provisions *and* "disclose the quantity of seats available [at the discounted fare] on specific flights."

This requirement could substantially reduce the number of discount seats that airlines now offer consumers. Airlines currently employ extremely sophisticated computer programs to allocate fares on a flight-by-flight, day-by-day basis under "yield management" systems designed to ensure that each flight takes off with as many seats filled as possible.[15] Under this system, airlines continuously analyze the demand for seats on each flight and alter the mix of different fares in order to fill the flight. The number of seats available at different fares can change up to departure of the flight. As a result, the number of seats allocated at a particular discount fare may be taken 10 days before a flight, but cancellations or a change in demand may result in additional discount

[14] In addition to the restrictions on fare advertising, several other provisions, § 1.8 (Prompt Refunds), § 1.9 (Surcharges), and § 1.10 (Round Trip Advertising), regulate matters that it is our understanding DOT rules or orders already encompass. Moreover, it is our understanding that the task force proposal may conflict with those DOT regulations.

[15] *See* Washington Post, *High Sky Balancing Act As Airlines Juggle Discounts, Overbookings*, May 17, 1987, at H1.

seats becoming available two days before departure. Similarly, seats on flights departing at off-peak times may be offered at deeper discount fares in order to attract more customers. Moreover, fare adjustments are also made in order to meet competition from other airlines.

The complexity of the yield management pricing system is virtually impossible to explain in advertising. The flexibility to respond to demand by adjusting prices to fill each flight would be lost under the more static seat allocation program the task force's guidelines could impose. Depriving airlines of the necessary flexibility to offer deeply discounted fares will raise the cost of airline service while significantly restricting consumers' access to low fare air travel. As long as consumers understand that advertised low fares are available for only limited seating, there is no apparent basis for requiring the disclosure of the specific number of low fare seats available on each flight.

The draft guidelines do not offer an explanation of the factual or legal basis for such burdensome affirmative disclosure requirements in airline advertising. Nor does the information we have seen to date suggest that the failure to make the sweeping disclosures required by these guidelines could be viewed as an unfair or deceptive act or practice. Settled precedent and sound policy argue strongly against such requirements.

Law enforcement action may, of course, be needed when specific advertising is deceptive or omits critical information. It is our understanding that the Department of Transportation attempts to monitor advertising for such occurrences. On balance, action against particular instances of unfair or deceptive conduct may be preferable in this industry to more general regulation that also burdens advertising that is truthful and nondeceptive.

Section 2—"Frequent Flyer" Programs

Section 2 of the NAAG proposal sets forth a comprehensive substantive regulation of the terms and conditions of "Frequent Flyer Programs." There is only cursory discussion of the factual basis for these guidelines and no discussion of the legal basis for them.[16] However, this area would seem to be one in which careful consideration of both the facts and law is particularly critical. First, press reports and Congressional testimony of the Department of Transportation indicate that although certain airlines attempted to change their frequent flyer programs in the past, these changes were largely rescinded in response to concerns expressed by air travelers. In light of this response, it is not clear why NAAG believes there is a need for guidelines in this area. Second, the Department of Transportation has reviewed airline disclosures in frequent flyer programs and concluded that they give adequte notice to consumers of possible future changes.[17] Thus, it is unclear that the airlines are guilty of any unfair or deceptive acts or practices. Absent such a showing, the proposed remedial scheme, which imposes substantive requirements such as a one year pre-notification of any changes in terms of the program, would seem to lack justification.

Section 3—Denied Boarding Compensation

Section 3 deals with disclosure of policies on compensation for voluntary denied boarding. The Department of Transportation has regulations governing denied

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[16] In *Orkin Exterminating Co.*, D. 9176 (Dec. 15, 1986), the Commission held that under some conditions it is an unfair practice, under the Federal Trade Commission Act, to systematically breach contracts. But there is no discussion in this proposal indicating that these conditions are present here. Moreover, we are aware that a number of states have not enacted prohibitions against unfair acts or practices, on which authority we presume the task force would base such guidelines.

[17] Testimony of Matthew Scocozza, *supra* note 13.

boarding compensation.[18] Although these regulations do not specifically govern disclosure of conditions or restrictions on offers made to induce passengers to give up their seats in the event of overbooking, DOT has taken action in the past where problems existed. Again, without any factual analysis of the current need for this guideline, it is difficult to evaluate why the task force believes that state intervention is necessary here.

Conclusion

The economic evidence is clear that airline deregulation is providing major benefits to American consumers. A recent Brookings Institution study estimates that travelers save $10 billion each year from lower air fares and increased frequencies due to deregulation.[19] These gains were made possible by eliminating regulatory restraints that prevented carriers from taking advantage of the economies available in improving route structures and resource allocation. Most importantly, airlines are now also free to compete on price, with the result that from 30 to 50 percent of seats sold today are offered at a discount.[20]

Among the biggest winners in airline deregulation have been discretionary travelers who can plan their trips well ahead of time.[21] Because of deregulation, airlines can now offer this class of customer deeply discounted fares. Air travel is up 50 percent from 1977,[22] as the

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[18] 14 C.F.R. § 250 (1987).

[19] *See* S. Morrison & C. Winston, *supra* note 1. We do not have precise estimates of the nature and amount of any costs of airline deregulation, but have not seen evidence that they are significant compared to the benefits.

[20] *See* Washington Post, *supra* note 15, at H7 (quoting Robert Baker, Director of Intergovernmental and Consumer Affairs, U.S. Department of Transportation). It should be noted that there need be no inconsistency between economic deregulation of the airline industry and ensuring the safety of air travel.

[21] *See* S. Morrison & C. Winston, *supra* note 1, at 33-35.

[22] *See supra* note 2.

skies have been opened up to millions of people who could not afford air travel in a less competitive environment. The task force's draft guidelines may significantly reduce these benefits by subjecting the airline industry to burdensome and unnecessary new regulation while providing consumers very little in return. We therefore urge that the task force reconsider the need for these guidelines.

By direction of the Commission.

/s/ Benjamin I. Berman
BENJAMIN I. BERMAN
Acting Secretary

APPENDIX B

U.S. DEPARTMENT OF TRANSPORTATION
400 Seventh St., S.W.
Washington, D.C. 20590

General Counsel

October 19, 1987

Christopher M. Ames
Deputy Attorney General
Office of the Attorney General
Department of Justice
350 McAllister Street, Room 6000
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Dear Mr. Ames:

This letter is in response to Attorney General Webster's request for our comments on the recommendations of the National Association of Attorneys General Task Force on the Air Travel Industry. We appreciate the concern of your association and its members with respect to airline advertising and are grateful for the opportunity to comment on your draft Guidelines. Air travelers have often benefited in the past from the vigorous actions of the states regarding fraudulent schemes or practices by some individuals or businesses. We hope that this beneficial enforcement will continue as a priority. However, we must point out that a number of the recommendations appear to be preempted by the Federal Aviation Act (49 USC § 1301 *et seq.*) or Department of Transportation (DOT) rules or would unduly burden interstate commerce.

In section 1, the Task Force attempts to ensure that more information about restrictions on airline fares is given consumers in media advertisements and that such restrictions are clearly presented. In general, we have no objection to such Guidelines, since they are refinements of

present Department policy to alert consumers about restrictions on fares. However, we are concerned that the cure for allegedly deceptive advertising not infringe on the ability of passengers to purchase airline tickets with various types of associated fares and services. Because of the burden that would be placed on airline fare advertising by the extent of the Guideline's "material restriction" requirement, an unintended outcome would also be a decrease in, or the elimination of, price competition and advertising to foster it or a reduction in restricted discount fares and airline seat-yield management. These are essential to a deregulated air transportation market. The importance of these goals is shown in section 105 of the Federal Aviation Act, which specifically bars State regulation of fares and services. Since the effect of the Guidelines would be to materially diminish the ability of airlines to advertise discount restricted fares, they would run afoul of this provision.

More particularly, subsection 1.1 lists 13 examples of restrictions that must be disclosed in media advertisements. By including this number of restriction types, with the specificity required, the Guidelines would, in effect, force carriers to place their extensive and detailed contracts of carirage in advertisements. The purpose of advertisements is not to describe every contractual restriction or limitation that a buyer must accept when purchasing a good or service, and we were aware of no industry where such disclosure in advertisements is required. Permission to incorporate contract terms by reference, including those dealing with specific requirements about restrictions on refundability, as well as their disclosure is, of course, also preempted by DOT rules (14 CFR Part 253). The last item in subsection 1.1 is especially troubling. It concerns ticket refund policies. That area is specifically preempted by Federal law. The Consumer Credit Protection Act through Regulation Z of the Federal Reserve Board (implemented for airlines by 14 CFR Part 374) specifically sets seven days for credit re-

funds, and Department enforcement orders (See e.g., Order 87-6-29) have set 20 days for cash refunds as the standard to be met. The refund provision in subsection 1.1 appears to imply different standards are permissible. Subsection 1.8, which recommends refund requirements, is also preempted for these reasons.

We urge you to continue to strive for non-misleading advertising, but to reduce or combine the specific covered restrictions in subsection 1.1 that must be disclosed. The purpose should be to alert the customer that certain important kinds of restrictions and limitations exist, not to restate each contract obligation or condition that the buyer and seller must accept. For this purpose, it is important to note that over 75 percent of all airline tickets are sold by travel agents who offer expertise about the intricacies of airline fares and the restrictions and limitations they incorporate. For all the reasons stated above and especially because of the expansiveness of subsection 1.1, we object to subsections 1.2 through 1.6 and to subsection 1.11 of the Task Force recommendations.

With respect to subsections 1.4, 1.5 and 1.6, we note that billboard advertisement is treated differently, without explanation, from other advertising media. We fail to see how the Task Force can justify requiring 10- or 15-second television or radio ads to state all "material restrictions" while billboard ads would be exempt. The result would be to discourage airline price advertising except on billboards—a result which appears unwarranted to us and which as implemented may run afoul of various State and Federal policies discouraging the proliferation of highway billboards, e.g., 23 U.S.C. § 131.

We also believe subsections 1.7 through 1.10 are preempted by statute and rule. Subsection 1.7 would require that seats be available in sufficient quantity to meet "reasonable" demand on every flight, every day, at the advertised price, subject only to limited exceptions. This guideline clearly conflicts with section 105 of the Act. It is

regulation of pricing policies of the airlines and is thus preempted. Airlines use sophisticated, computerized seat-yield management programs that vary seat availability frequently so as to be able to provide discount, higher restricted availability seats to discretionary passengers and to charge higher prices to on-demand non-discretionary passengers and thereby fly each aircraft as full as possible.

Prohibitions against advertisements for prices that are never available and requirements for the disclosure of fare restrictions and limited seat availability, in general terms, could be structured, however, so as not to interfere with airline fare policies.

Subsection 1.8 about refunds is preempted for the reasons discussed in reference to subsection 1.1 above.

Subsections 1.9 and 1.10, requiring surcharges to be included in the total price advertised and prohibiting advertisement of one-way fares based on roundtrip purchase only, respectively, are also in conflict with Federal rules. The Department rule on price advertising is in 14 CFR 399.84. That rule and Department interpretations of it follow separate disclosure of defined surcharges and the advertisement of one-way fares if the restriction on roundtrip-only purchase is disclosed. We believe the Guidelines are thus preempted in this area.

Section 2 of the Guidelines would place requirements on the advertisement and operation of airline frequent flyer programs. We believe that contract law adequately protects the members of frequent flyer programs who tend to be sophisticated individuals who can readily avail themselves of small claim or class action suits for redress of any abuses that might occur. Nonetheless, while we do not believe that the detailed regulation proposed—especially with respect to operation of the programs—is necessary, we do not object in general to such Guidelines.

We do object, however, to subsection 2.2.2. That subsection is most troubling. It requires a carrier to honor any ticket awarded to a frequent flyer program member for travel within 15 days prior to or after the date requested. Other passengers who purchase tickets having the same basic restrictions as the passenger with the awarded seat do not have that right. In addition, the specific time frame for redemption could have the effect of requiring the airline to displace passengers already ticketed. Similarly, the required guarantee of existing program rights for one year and the one-year notice of changed requirements in subsections 2.2.3., 2.2.4, 2.2.5. and 2.12. appear to present problems of substantive regulation under the statute and our regulations.

Again, advance disclosure of limitations on availability of entitlements and prohibitions on the offering of awards never available should be sufficient to prevent alleged abuses. State disclosure requirements consistent with out standards in this area may serve a valid legal function.

We would finally call your attention to the ramifications of the traditional filed-tariff doctrine, which considers each filed tariff to embody the entire contract of carriage. To the extent that any of these Guidelines may conflict with carrier rules contained in effective tariffs that are properly filed with the Department, the courts have consistently found such State requirements to be preempted. Carriers are still required to file and adhere to tariffs for "foreign air transportation" as defined in section 101 of the Act.

In general, we welcome State assistance in policing and preventing deceptive and misleading practices. I must express some caution, however, about the impact of these "uniform" State Guidelines. Adoption of such Guidelines, even if by all jurisdictions, could still lead to many different interpretations and exercises of enforcement discretion across the country. If differing application and interpretation should be so extensive as to conflict with

the Federal scheme for airline regulation or indirectly impair the ability to maintain an efficient national air transportation system, we would, of course, review our position on the continued viability of the Guidelines.

My staff and I will be glad to work with you concerning enforcement and interpretation and to discuss with you any differences we may have about the Guidelines. The point of contact in my office will be Samuel Podberesky, Assistant General Counsel for Aviation Enforcement and Proceedings, who can be reached at (202) 366-9342.

Thank you for the opportunity to comment on your initiative.

Sincerely,

B. Wayne Vance
B. WAYNE VANCE
General Counsel

APPENDIX C

FEDERAL TRADE COMMISSION
Washington, D.C. 20580

Office of the Secretary

March 11, 1988

Mr. Christopher M. Ames
Deputy Attorney General
Office of the Attorney General
Department of Justice
350 McAllister Street, Room 6000
San Francisco, California 94102

Dear Mr. Ames:

This letter is submitted in response to the resolution of the National Association of Attorneys General (NAAG) inviting comments from the industry, consumer groups, federal agencies, and other interested parties, on the Air Travel Industry Enforcement Guidelines. The Commission appreciates the opportunity to comment.[1]

In comments on an earlier draft of the Guidelines, the Commission stated that the legal and factual bases for the proposed regulations of advertising, frequent flyer programs and overbooking compensation policies were unclear.[2] The Commission also expressed its concerns that the Guidelines could impose requirements inconsistent with current federal regulations and could inhibit effective price competition among the airlines. Although the *NAAG Task Force on the Air Travel Industry, Final Report And Recommendations* addressed some of those concerns, it has not allayed the Commission's fears that the Guidelines could unnecessarily burden truthful price advertising. The vast majority of air travelers are reported

[1] Commissioners Bailey and Strenio do not join in this letter.

[2] Letter from Federal Trade Commission to Christopher Ames, Deputy Attorney General, California (Oct. 1, 1987).

to use discount fares,[3] and the Commission is especially troubled by press reports suggesting that some airlines have reduced or eliminated their advertising of discount fares on television because of the disclosure requirements of the Guidelines.[4]

Because we believe that the legal and factual bases for the Guidelines have not been sufficiently elaborated and because we are concerned that the Guidelines may have discouraged truthful price advertising during the time that they have been in effect, we recommend that they be rescinded.

The Legal Basis for the Guidelines

The legal authority for the Guidelines remains far from clear. The *Final Report* contains virtually no discussion in support of the conclusion that advertising which fails to conform with the Guidelines' requirements is unfair or deceptive under state law. The *Final Report*[5] does not cite a single court decision finding unfairness or deception in the practices the Guidelines would discourage nor does it discuss the questions raised by the Commission in its letter of October 1, 1987, concerning the legal basis for the Guidelines. Analysis of prior Commission actions with respect to similar issues would seem particularly relevant to the work of the Task Force because of the many state statutes specifically referencing Section 5(a) of the FTC Act and the Commission's interpretations as

[3] *Economic Report of the President* (1988), at 203; *The Deregulated Airline Industry: A Review of the Evidence*, Federal Trade Commission Staff Report, (Jan. 1988), at 1. This percentage has been reported to be as high as 90 percent.

[4] *Wall St. J.*, Feb. 9, 1988, at 44, col. 2; *see also, Advertising Age*, Feb. 1, 1988, at 1, col. 1.

[5] *NAAG Task Force on the Air Travel Industry, Final Report and Recommendations*, (1987) (hereinafter cited as "*Final Report*").

guidance for construction of the state law.[6] In other states, such as New York, the relevance of the Commission's interpretation of Section 5 for purposes of construing state law has been established by case law rather than by statute.[7]

Similarly, the Task Force's *Final Report* does not address the significance of the disparities that exist in consumer protection authority from state to state, or discuss the legal basis for such broad disclosure requirements in states that have chosen not to vest in their attorneys

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[6] For example, the Texas statute, in relevant part states:

> (c)(1) It is the intent of the legislature that in construing Subsection (a) of this section in suits brought under Section 17.47 of this subchapter the courts to the extent possible will be guided by Subsection (b) of this section and the interpretations given by the Federal Trade Commission and federal courts to Section 5(a)(1) of the Federal Trade Commission Act [15 U.S.C.A. 45(a)(1)].

Tex. Bus. & Com. Ann. § 17.41 (Vernon 1968 & Supp. 1987). *See also, Ala. Code* § 8-19-1 (1986); Alaska Stat. § 45.50.545 (1986); Ariz. Rev. Stat. Ann. § 44-1522B (1987); Conn. Gen. Stat. Ann. § 42-110a (West 1987); Fla. Stat. Ann. § 501.201 (West Supp. 1987); Ga. Code Ann. § 106-1201 (Harrison 1984 & Supp. 1987); Idaho Code § 48-601 (1977 & Supp. 1987); Ill. Ann. Stat. Ch. 121 1/2, § 261 (1987); Me. Rev. Stat. Ann. tit. 5 § 206 (1986); Md. Com. Law Code Ann. § 13-101 (1983 & Supp. 1987); Mass. Gen. Laws Ann. ch. 93A § 1 (West 1984 & Supp. 1987); Mont. Code Ann. § 30-14-101 (1987); N.H. Rev. Stat. Ann. § 358:1 (1983); N.M. Stat. Ann. § 57-12-1 (1978 & Supp. 1985); Ohio Rev. Code Ann. § 1345.01 (Page 1979 & Supp. 1986); R.I. Gen. Laws § 6-13-1 (1985); S.C. Code Ann. § 39-5-10 (1976 & Supp. 1987); Tenn. Code Ann. § 47-18-101 (1984); Utah Code Ann. § 13-11-2 (1986); Vt. Stat. Ann. tit. 9, § 2451a (1984 & Supp. 1986); W. Va. Code § 46 A-1-101 (1986).

[7] *State v. Colorado State Christian College of Church Inner Power, Inc.*, 346 N.Y.S. 2d 482, 487 (1973). ("It is thus clear that the legislative purpose in enacting § 349 of the General Business Law was to follow in the steps of the Federal Trade Commission with respect to interpretation of deceptive acts and practices outlawed in § 5 of the Federal Trade Commission Act.")

general the power to prohibit unfair practices[8] or which have carefully circumscribed their deception authority.[9]

Finally, it is not apparent from the legal discussion of the specific sections of the Guidelines that the failure of an advertisement to meet a particular requirement would thereby render the advertisement deceptive or unfair even under the broadest state statutory provisions. The Task Force Report has not demonstrated that the Guidelines represent a general restatement of state law of unfairness and deception.

The Factual Basis for the Guidelines

The *Final Report* cites, as a primary basis for the Guidelines, a dramatic increase in the volume of complaints to state consumer protection and state attorneys' general offices.[10] The Task Force has not released the complaints on which it has relied. The *Final Report* also

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[8] Many state and territorial consumer protection acts are expressly narrower than the FTC Act, 15 U.S.C. § 45(a), in the breadth of the practices reached. Nineteen state and territorial statutes prohibit only deceptive acts or practices, or contain only limiting itemizations of prohibited acts. Ala. Code § 8-19-1; Ark. Stat. Ann. § 4-86-106; Ariz. Rev. Stat. Ann. § 44-1521; Colo. Rev. Stat. § 6-1-101; Guam Code Ann. § 53610; Ind. Code § 24-5-0.5-1; Iowa Code § 714:16; Kan. Stat. Ann. § 50-623; Minn. Stat. § 325.F.68-70; Nev. Rev. Stat. § 598-410; N.J. Rev. Stat. § 56:8-1; N.Y. Gen. Bus. Law § 349; N.D. Cent. Code § 51-15-01; S.D. Codified Laws Ann. § 37-24-1; Tex. Bus. & Com. Code Ann. § 17.41; Va. Code Ann. § 59.1-196; Wyo. Stat. § 40-12-102; Okla. Stat. tit. 15 § 751; D.C. Code Ann. § 3904.

[9] There is no analysis of how these statutes apply to any or all of the practices covered by the NAAG Guidelines. Colo. Rev. Stat. § 6-1-101; D.C. Code Ann. § 3904; Guam Code Ann. § 53610; Ind. Code § 24-5-0.5-1; Mich. Stat. Ann. § 445.901; Miss. Code Ann. § 75-24-1; Nev. Rev. Stat. § 598-360; Okla. Stat. tit. 15 § 751; Wyo. Stat. § 40-12-102. In addition, two states prohibit unfair and deceptive acts, but itemize the acts prohibited. Mich. Stat. Ann. § 445.901; Miss. Code Ann. § 75-24-1.

[10] *Final Report*, at 1-3.

does not state the number of complaints received, describe the nature of the complaints, or evaluate their validity.

As the Commission indicated in its letter of October 1, 1987, Department of Transportation (DOT) complaint statistics suggest that relatively few of the airline complaints that DOT receives concern advertising. During 1987, advertising accounted for less than 1 percent of complaints about airlines received by DOT. While the *Final Report* states that consumer dissatisfaction has reached crisis proportions, DOT complaint data show barely one advertising complaint per million passengers transported. The Commission is puzzled by the disparity between the figures reported by DOT, and the widespread and continuous complaints that the Task Force reports. The Task Force has not described its evidence that current airline fare advertising, frequent flyer programs, or overbooking compensation practices are subject to widespread, continuous or systematic deception or unfairness. It is therefore impossible to assess whether the Guidelines may be reasonably necessary to combat systematic deception, or may unnecessarily impose substantial costs on consumers to prevent isolated problems that might be better handled on a case-by-case basis. Therefore, it is important that the factual basis for the Guidelines be analyzed and shared with interested parties.

The Danger to Fare Advertising

As we noted in our letter of October 1, 1987, advertising is seldom an appropriate vehicle for disclosing all material characteristics of a product or service. Contrary to the conclusion in the Task Force's Comment to Section 2.1, it is not clear that consumers of air travel rely on advertising of this type to make a final purchase decision. A primary goal of advertising is to signal that bargain prices or new types of products or services are available and suggest that consumers inquire further.

Requiring too much information in advertisements can have the paradoxical effect of stifling the information that consumers receive. The disclosure requirements contained, for example, in the broadcast commercial guideline may continue to be overly burdensome.[11] Indeed, there have already been press reports that airlines are curtailing their broadcast fare advertising in response to the Guidelines.[12]

Advertising serves as a primary vehicle for price and quality competition in numerous industries.[13] It is thus important that NAAG evaluate the Guidelines to ensure that they do not burden truthful advertising in a manner that may reduce information and hamper product innovation in the airline industry. Since an airline's incentive to create new products or services will depend on its ability to advertise them (typically by signalling the lower fare), the Guidelines' disclosure requirements threaten to reduce that price competition. The Task Force appears to have anticipated the chilling effect the Guidelines would have upon restricted discount fares. The *Final Report* states that one of the purposes of the Guide-

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[11] For example, the Air Transport Association (ATA) apparently believes that the Guidelines will make many broadcast commercials unintelligible and move airlines away from price advertising. Letter from James L. Casey, Assistant General Counsel, Air Transport Association, to Christopher M. Ames, Deputy Attorney General, State of California (Feb. 8, 1988).

[12] *Wall St. J.*, Feb. 9, 1988, at 44, col. 2; *see also, Advertising Age*, Feb. 1, 1988, at 1, col. 1.

[13] *See, e.g.*, J. Cady, Drugs on the Market: The Impact of Public Policy on the Retail Market for Prescription Drugs (1975); W. Jacobs, et al., Staff Report on Consumer Access to Legal Services: The Case for Removing Restrictions on Truthful Advertising, Federal Trade Commission (1984); Kessides, Advertising, Sunk Costs And Barriers To Entry (1983); Benham, The Effects of Advertising on the Price of Eyeglasses, 4 J.L. & Econ. 337 (1972); Steiner, Does Advertising Lower Consumer Prices? J. of Marketing, (Oct. 1973), at 19.

lines is to "[d]iscourage airlines from advertising fares, the availability of which is unlikely to meet reasonable demand." [14] The *Report* goes on to state:

> [T]he FTC and the industry argue that if airlines are forced to disclose to consumers the conditions and limitations that attach to their price advertising, they will engage in less price advertising. But, if the competitive forces in the industry have generated intense price advertising now, there is no reason why those same competitive forces would not generate price advertising where the conditions attaching to the advertised offer are either clearly delineated in the ad *or, more likely, where the limiting conditions are simply dropped.* There is no *a priori* reason why the airlines would reduce price advertising *as opposed to dropping the conditions they would otherwise have to disclose or simplifying those conditions in conformance with the NAAG enforcement Guidelines.*[15]

Thus, the Guidelines could have an effect on the terms and conditions of discount airline fares as well as the advertising of those fares. Because the least expensive discount fares often have the most limiting conditions, anything that discourages such conditions may also discourage discount fares. Such a result would have a serious detrimental effect on consumers.

Conclusion

As we stated in our letter of October 1, 1987, law enforcement action may, of course, be needed when specific advertising is deceptive or omits critical information. DOT monitors airline advertising for such occurrences. On balance, action against particular instances of unfair or deceptive conduct appears preferable in this industry

[14] *Final Report*, at 13.

[15] *Final Report*, at 16. (Emphasis added).

to a more general regulation that also burdens advertising that is truthful and nondeceptive.[16] The Task Force unfortunately misconstrued our position as resting on "the unstated assumption that the states ought to tolerate deceptive and misleading advertising in order to encourage price advertising among airlines." [17] The Commission has never assumed or stated that states should tolerate deception in order to foster advertising. To the contrary, the Commission's position was, and remains, that law enforcement officials should not simply assume, without an adequate legal and factual basis, that deception exists, particularly when that assumption provides the basis for a regulation that has the potential to harm consumers.

The Commission recommends that the Guidelines be rescinded because they may have imposed unnecessary limitations on truthful and non-misleading advertising. It would be unfortunate indeed if the Guidelines unnecessarily were to deprive consumers of significant information about the availability of low airfares.

By direction of the Commission.

/s/ Emily H. Rock
EMILY H. ROCK
Secretary

[16] As we stated in our letter of October 1, 1987, DOT already regulates airline advertising under Section 411 of the Federal Aviation Act, which generally prohibits unfair or deceptive acts or practices. Under this authority DOT reports that it has already taken informal action to correct questionable advertisements and, in addition, maintains a consumer affairs office to resolve individual consumer complaints, including complaints about advertising. Testimony of Matthew Scocozza, Assistant Secretary for Policy and International Affairs, U.S. Department of Transportation, Before the House Subcommittee on Aviation, Committee on Public Works and Transportation (June 9, 1987).

[17] *Final Report*, at 17.

APPENDIX D

Order 89-4-25

UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
Office of the Secretary
Washington, D.C.

Issued by the Department of Transportation
on the 11th day of April, 1989

SERVED APRIL 11, 1989

PAN AMERICAN WORLD AIRWAYS, INC.

PROHIBITION OF ADVERTISING PRACTICES

CONSENT ORDER

The Department's policy on advertisement of air transportation, 14 CFR 399.84, requires that all price advertisements of flights, tours, or components of tours state the entire price of advertised flights, tours, or any tour components. The Department regards violations of section 399.84 as unfair or deceptive practices within the meaning of section 411 of the Federal Aviation Act. By Order 85-12-68, the Department granted an exemption from section 399.84 to allow advertisements that exclude the U.S. international departure tax from the total advertised price, provided that the advertisements clearly indicate both the amount of the tax and that all passengers are required to pay it in addition to the stated price. Subsequently, by Order 88-3-25, this exemption was amended to allow advertisements that list certain other taxes and government-imposed or government-approved fees separately, again provided that the amount of each such charge is clearly indicated in the advertisement (either separately or as a total).

Several months after issuing Order 88-3-25, finding clarification of that order to be warranted, the Department

issued Order 88-8-2. The latter order provides that government-imposed charges are only exempt from section 399.84 if they are levied on individual passengers and collected by the advertisers to be passed directly and entirely to the levying government. The order makes it clear that "per-passenger surcharges that carriers themselves set in response to charges which government entities levy on them without regard to individual passengers" are not exempt from section 399.84. Rather, such surcharges "must be included in the total airfare advertised." [1] The order also makes it clear why failure to include such surcharges in the advertised total price would be deceptive.

On March 2, 1989, in newspapers across the country, Pan American World Airways, Inc. (Pan Am) ran an advertisement of special low fares to various destinations. The advertisement listed the following charges separately: (1) a U.S. departure tax, security charge, and customs fee of $23, (2) an additional government-approved security charge for Latin American destinations of $10, and (3) fuel surcharges of $2, $2.50, and $5 for domestic flights from Florida, Boston, and Chicago, respectively. While we allow separate listing of the first two sets of charges, separate listing of fuel surcharges is prohibited by section 399.84. That prohibition was made even more explicit in Order 88-8-2:

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[1] Orders 88-3-25 and 88-8-2 have recently been overturned on procedural grounds by the U.S. Court of Appeals for the District of Columbia Circuit in *State of Alaska et al. v. U.S. Department of Transportation*, Nos. 88-1348 and 88-1682 (February 28, 1989). Nevertheless, it has been the Department's consistent enforcement policy not to prosecute airlines for listing the surcharges specifically identified in these two 1988 orders separately, because we do not regard separate listing of these surcharges as an unfair or deceptive advertising practice. For this same reason, we plan to continue this enforcement policy, and we do not intend to take enforcement action against the types of advertisements allowed by the two 1988 orders.

> Carriers are entitled to recoup their costs, of course, but surcharges set by the carriers themselves and not approved by a government entity as separate surcharges must be included in the total airfare advertised. *For example, if a local government imposes a per-gallon tax on aviation fuel purchased at its airport, a carrier is free to impose a surcharge on all tickets for flights departing from that airport. Regardless of such a surcharge's genesis, however, it must be included in the total advertised airfare.*[2]

The Office of Aviation Enforcement and Proceedings and Pan Am have agreed to settle this matter. In order to avoid costly and time-consuming litigation, and without an acknowledgement of liability, Pan Am agrees to the issuance of this order to cease and desist and to pay compromise civil penalties in the amount of $20,000, with $10,000 to be forgiven if the carrier refrains from similar activity for the next year. This settlement should dissuade Pan Am and other carriers from similar violations in the future.

This order is issued under authority contained in 49 CFR 1.57a and 14 CFR 385.22.

ACCORDINGLY,

1. Based on the above discussion, we approve this settlement and the provisions of this order as in the public interest.
2. We find that Pan American World Airways, Inc., engaged in an unfair and deceptive practice under section 411 of the Federal Aviation Act and 14 CFR 399.84 when it listed fuel surcharges separately from fares in advertising its services in a number of newspapers. We order Pan American World Airways, Inc., to cease and desist from such activity.

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[2] Order 88-8-2 at 4 (emphasis supplied).

3. Pan American World Airways, Inc., is assessed $20,000 as a compromise of civil penalties that might otherwise be assessed for the violations found in ordering paragraph 2 of this order. Of this amount, $10,000 is due immediately, but the remaining $10,000 shall be forgiven if Pan American World Airways, Inc., does not engage in the conduct described in the second paragraph for the next year. If Pan American World Airways does engage in such conduct within the year, that $10,000 shall become due and payable immediately. Payment shall be made by wire transfer through the Federal Reserve Communications System, commonly known as "Fed wire," to the U.S. Treasury within 10 days of the service date of this order. The wire transfer shall be executed in accordance with the enclosed instructions. Failure to pay the penalty as ordered will subject Pan American World Airways, Inc., to assessment of interest, penalty, and collection charges under the Debt Collection Act, and possible enforcement action for failure to comply with this order.

This order will become a final order of the Department 10 days after its service date unless a timely petition for review is filed or the Department takes review on its own motion.

By:

ROSALIND A. KNAPP
Deputy General Counsel

(SEAL)

APPENDIX E

U.S. DEPARTMENT OF TRANSPORTATION
400 Seventh St., S.W.
Washington, D.C. 20590
General Counsel

Aug. 3, 1990

Honorable Warren Price, III
Attorney General of Hawaii
State Capitol, Room 405
Honolulu, Hawaii 96813

Dear Mr. Price:

The purpose of this letter is to ask you to join the U.S. Department of Transportation in our efforts to prevent unfair and deceptive practices in the air transportation industry. As you may know, the Department is responsible for implementing and enforcing the Federal Aviation Act of 1958, 49 USC 1301 *et seq.* Section 411 of the Act, 49 USC 1381, prohibits unfair and deceptive practices in air transportation and its sale. In addition to section 411's general mandate, various Department rules, regulations, and policy statements promulgated under section 411 and orders issued under that section govern particular aspects of the air transportation industry, including advertising and other consumer protection matters.

Since the sunset of the Civil Aeronautics Board in 1985, this Department has enforced section 411 aggressively, primarily emphasizing consumer protection. In enforcement actions by the Office of the Assistant General Counsel for Aviation Enforcement and Proceedings, the Department has issued some fifty orders to cease and desist under section 411 and has assessed civil penalties totaling more than one million dollars. Seven of these orders and nearly $100,000 of the civil penalties have concerned un-

fair or deceptive fare advertising by airlines. Additionally, our Consumer Affairs Office has resolved consumer problems in innumerable cases where enforcement action would not have been appropriate.

The Department staff has enjoyed cordial relationships with many state officials in consumer affairs and Attorney General offices, and worked together with these state officials to resolve many airline consumer problems. However, it is our intention to do everything possible to achieve an even greater level of cooperation as we well recognize that we can carry out our enforcement program much more widely and effectively with your assistance then we can on our own. In fact, your assistance could well be critical in many cases.

Accordingly, we would request that any time that you become aware of any unfair or deceptive practice in the airline industry or any other potential violation of the Federal Aviation Act or our implementing regulations and policy statements (14 CFR Parts 200-399), contact should be made with Hoyte Decker, Chief of our Consumer Affairs Office (202-366-5957), or Sam Podberesky, Assistant General Counsel for Aviation Enforcement and Proceedings (202-366-9342). By working together we will certainly achieve the greatest possible success in protecting airline consumers. Your assistance in this important undertaking is very much appreciated.

Sincerely,

/s/ Phillip D. Brady
PHILLIP D. BRADY
General Counsel

APPENDIX F

U.S. DEPARTMENT OF TRANSPORTATION
400 Seventh St., S.W.
Washington, D.C. 20590
General Counsel

October 4, 1990

Honorable Warren Price, III
Attorney General of Hawaii
425 Queen Street
Honolulu, Hawaii 96813

Re: Nos. 90-221 and 90-232, *Jim Mattox, et al.*, v. *Trans World Airlines, Inc., et al.*, In the Supreme Court of the United States

Dear Mr. Price

Recently you and seven other state attorneys general submitted an amicus brief in support of the above-referenced petitions for writ of certiorari. One statement in your brief reflects an apparent misunderstanding of this Department's enforcement powers which we would like to clarify.

The statement in question is contained in the first sentence of the first full paragraph on page 8 of the brief. It reads—

> If state regulatory powers are preempted, the only penalty against an airline or related business engaged in false and deceptive advertising would be a cease and desist order issued by the Secretary of the United States Department of Transportation under 49 U.S.C. App. § 1381.

In fact, under section 901 of the Federal Aviation Act (49 U.S.C. App. § 1471), this Department has the au-

thority to impose civil penalties of up to $1,000 per violation and $1,000 per day for each day of a continuing violation of the pertinent provisions of the Act or any rule, regulation or order issued thereunder. The imposition of criminal penalties is also possible under 49 U.S.C. App. § 1472 for knowing and willful violations of those provisions. Since this Department assumed the powers of the Civil Aeronautics Board over consumer protection in the airline industry in January 1985, we have assessed civil penalties of more than $1,000,000 in consumer protection cases involving violations of section 411 of the Federal Aviation Act (49 U.S.C. App. § 1381) and have reached substantial settlements involving monetary restitution to consumers. The fact that we have collected substantial civil penalties in depective advertising cases was pointed out in our letter of August 3, 1990, which was sent to you and all other state attorneys general (copy enclosed). In addition, the Secretary's authority to issue enforcement orders has been delegated to various individuals within the Department under 49 CFR Part 1 (See, *e.g.*, 49 CFR 1.57a) and 14 CFR § 302.200 *et seq.* You may thus wish to correct the statement in your brief.

I trust that this information is useful to you and I am sending a copy of this letter to the other attorneys general who joined with you in filing your amicus brief and to the other Counsel of Record in the case. In closing, I would like to reiterate the invitation contained in our August 3 letter for increased cooperation in the area of airline consumer protection enforcement.

Sincerely,

/s/ Samuel Podberesky
SAMUEL PODBERESKY
Assistant General Counsel for
Aviation Enforcement and
Proceedings

APPENDIX G

Respondents' Parent Companies and Subsidiaries (Except Wholly Owned Subsidiaries)

TRANS WORLD AIRLINES, INC.

Parent Company

TWA Airlines, Inc.

Subsidiaries (Except Wholly Owned Subsidiaries)

Airline Data Resources, Inc.
Airport Terminal Services, Inc.
Ambassador Fuel Corporation
Ambassador Health Systems, Inc.
Blue Jay Investors Plan, Inc.
Century Air Rail & Land Insurance Company
Elytron, Inc.
Getaway Management Services, Inc.
International Aviation Security, Inc.
International Aviation Security N.V.
Mega Advertising, Inc.
Midcoast Aviation, Inc.
Midcoast-Little Rock, Inc.
Northwest 112th Street Corp.
Ozark Group, Inc.
Storm Haven, Inc.
Swan Management Corp.
The Getaway Group (U.K.), Inc.
The Travel Channel, Inc.
The TWA Ambassadors Club, Inc.
Transcontinental & Western Air, Inc.
Trans World Airlines (Australia) Pty. Ltd.
Trans World Airlines Services, Inc.
Trans World Computer Services, Inc.
Trans World Express, Inc.
Trans World Pars, Inc.
TWA America, Inc.

TWA Aviation, Inc.
TWA de Mexico, S.A., de C.V.
TWA Employee Services, Inc.
TWA Getaway Vacations, Inc.
TWA Group, Inc.
TWA International, Inc.
TWA Investment Plan, Inc.
TWA Maintenance Services, Inc.
TWA Nippon, Inc.
TWA Standards & Controls, Inc.
TWA-U.S., Inc.
World Marketing Services, Inc.

CONTINENTAL AIRLINES, INC.

Parent Company

Continental Airlines Holdings, Inc.

Subsidiaries (Except Wholly Owned Subsidiaries)

Continental—Eastern Sales, Inc.
TAC/SAS Quality Service Institute, Inc.

BRITISH AIRWAYS PLC

PARENT COMPANY

None

Subsidiaries (Except Wholly Owned Subsidiaries)

Aeronautical Radio Thailand Limited
Air Mauritius Limited
Air Miles Travel Promotion Limited
Airinc Incorporated
Airline Tarriff Publishing Company
Anchorage Fuelling and Service Company Limited
Beau Vallon Properties Limited
Belfast Europa Limited
Bravo Communications Systems Limited

British Airways Medical Services for Travellers Abroad Limited
British Caledonian Flight Training Limited
Brussels Europa Limited
Covia Partnership
Dunwoody Airline Services (Holdings) Limited
Eupo-Air Holdings Limited
Eupo-Air Travel Services Limited
Euro-Hub (Birmingham) Limited
F R X International Limited
G B Airways (Holdings) Limited
Gambia Airways Limited
Hogg Robinson PLC
Home Assured Tenancy Limited
International Aeradio (Caribbean) Limited
Laxfuel Corporation
Los Angeles Technical Services Corporation
Los Angeles West Terminal Fuel Corporation
Mosside Enterprises Limited
Nigeria Aviation Handling Company
Ruby Aircraft Leasing and Trading Limited
San Francisco Foreign Flag Couriers Limited
Sapphire Aircraft Leasing and Trading Limited
Speedwing Logica Limited
Thai Airports Ground Services Limited
The Galileo Company Limited
The Plimsoll Line Limited

PAN AMERICAN WORLD AIRWAYS, INC.

Parent Company

Pan Am Corporation

Subsidiaries (Except Wholly Owned Subsidiaries)

Aeronautical Radio, Inc.
Air Cargo, Inc.
Airline Tariff Publishing Company
Escola Americana de Rio de Janeiro

Honolulu Fueling Facilities Corporation
International Aeradio (Caribbean) Ltd.
Liberian Development Corporation
Manhattan Air Terminal, Inc.
Nigerian Aviation Handling Co.
Social Immobiliara Norteamericana, S.A.
Société International de Telecommunications Aeronautiques

AIR CANADA

Parent Company

None

Subsidiaries (Except Wholly Owned Subsidiaries)

Air B.C. Limited
152160 Canada Inc.

COMPAGNIE NATIONALE AIR FRANCE

Parent Company

None

Subsidiaries (Except Wholly Owned Subsidiaries)

Air Charter
Air Inter
Amadeus France
Ecole de Pilotage Amaury de la Grange
Esterel
Euroberlin France
Saresco (Société Aéroportuaire de Restauration, de Services et de Commerces)
Servair (Compagnie d'Exploitation des Services Auxiliaires Aériens)
SHM (Société des Hôtels Meridien)
Société Immobilière Aéroportuaire
Sodexi
Sotair (Société de Tourisme Aérien International)
UTA French Airlines

ALITALIA-LINEE AEREE ITALIANE, S.p.A.

Parent Company

Istituto per la Ricostruzione Industriale (IRI)

Subsidiaries (Except Wholly Owned Subsidiaries)

Aeroporti di Roma—Societa per la Gestione del Sistema Aeroportuale della Capitale S.p.A.
Alidata S.p.A.
Alinsurance S.r.l.
Eurofly S.p.A.
Italiatour S.p.a.
Racom Teledata S.p.A.
Sigma—Societa Italiana Gestione Sistema Multi Accesso per Azioni
Sigma Travel System S.p.A.
Sisam S.p.A.

EL AL ISRAEL AIRLINES LTD.

Parent Company

None

Subsidiaries (Except Wholly Owned Subsidiaries)

None

FINNAIR

Parent Company

None

Subsidiaries (Except Wholly Owned Subsidiaries)

Airplus Company Ltd.
Asunto Oy Heikkiläntalo
Asunto Oy Iso-Roobertinkatu 3-5-7
Asunto Oy Mannerheimintie 100
Asunto Oy Metsätorppa, Kauppalantie 48
Asunto Oy Octavus, Mannerheimintie 84
Asunto Oy Tenholantie 4

Finlandia Travel Agency Ltd.
Finnaviation Oy
Finnish American International Trade Inc.
Finnland Haus GmbH
Infa-Hotel
Kar-Air Ab
Karair Oy
Oy TEN-MAR Fastighets Ab
Suomen Matkatoimisto Oy

LUFTHANSA GERMAN AIRLINES
(Deutsche Lufthansa Aktiengesellschaft)

Parent Company

None

Subsidiaries (Except Wholly Owned Subsidiaries)

Capital Gain International (1986) Ltd.
DLT Deutsche Luftverkehrsgesellschaft mbH
Delvag Rueckversicherungs-AG
Euro-Lloyd Reisebuero GmbH
Penta Hotel Managementges. mbH
Penta Hotels Muenchen GmbH
Penta Hotels N.V.
Reisebuero A.L.R. Atlantik Luft-Reederei GmbH

JAPAN AIRLINES COMPANY, LTD.

Parent Company

None

Subsidiaries (Except Wholly Owned Subsidiaries)

Avionet (USA) Inc.
Global Laundry & Linen Supply, Inc.
Hotel Nikko Saipan, Inc.
International Inflight Catering Company
JAL International Service, Inc.
JAL Leasing (USA) Inc.

Japan Airlines Management Corp.
Lanovac, Inc.
Nikko Inflight Catering Company
Pacific Fuel Trading Corp.

QANTAS AIRWAYS LTD.

Parent Company

None

Subsidiaries (Except Wholly Owned Subsidiaries)

Aeronautical Radio Thailand Limited
Air New Zealand Limited
Air Pacific Limited
Caterair Airport Services Pty. Limited
Fiji Resorts Limited
Gateway Passenger Services, LP
Holiday Tours & Travel Limited
Holiday Tours & Travel Pte. Limited
Holiday Tours & Travel SDN BHD
Holiday Tours & Travel (Thailand) Limited
Honolulu Fueling Facilities Corporation Inc.
Jetabout Holidays Pte. Limited
Jupiter Air (Australia) Pty. Limited
Laxfuel Corporation
Los Angeles West Terminal Fuel Corporation
Official Filing Company
Qadrant International Pty. Limited
QHF Insurance Brokers Limited
Société Internationale de Telecommunications Aeronautiques
Sun Tours Limited
Thomas Cook Limited
Tradegate Australia Limited
Travel Industries Automated Systems Pty. Ltd.

SCANDINAVIAN AIRLINES SYSTEM (SAS)*

Parent Company

None

Subsidiaries (Except Wholly Owned Subsidiaries)

Airline Tariff Publishing Company
Airlines of Britain Holdings, PLC
Amadeus Marketing S.A.
Areliftarna AB
Asiana Catering Inc. Seoul
Aviatour Group
Aviation Holdings PLC
Brannstoflagret CPH Lufthavn I/S
Casino Copenhagen K/S
Casinos Denmark A/S, CASINO
Club de Vacaciones S.A.
Cofitour
Continental Airlines Holdings Inc.
Copenhagen Excursions A/S
Coronado A/S, CORONADO
Danair A/S
Danish Tankage Services I/S
Danish Refueling Services I/S
Dar es Salaam Airport Handling Company Ltd.
Gronlandsfly A/S
Helios Hotels S.A.
Hotel Scandinavia K/S, CPHZA
International Service Partners
Jetpak AB
Kamppi Hotel Oy, SHOY
Københavns Lufthavns Forretningscenter K/S (Copenhagen Airport Shopping Center K/S)

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* The SAS Group is made up of the SAS Consortium and its subsidiaries and affiliated companies. The SAS Consortium was formed by the three national airlines of Denmark, Norway, and Sweden: Det Danske Luftfartseiskab A/S (DDL), Det Norske Luftfartseiskap A/S (DNL), and AB Aerotransport (ABA), respectively. The subsidiaries listed in this appendix are the subsidiaries and affiliated companies of SAS.

LanChile S.A.
Malmo Flyterminal AB
Nord Norsk Hotelldrift A/S, NNH
Nordic Tel
Nordkaps Vel A/S, N.V.
Norweigian Show Case A/S
Plusresor AB
Polygon Insurance Co. Ltd.
Prövorörstensledningen I/S
Saison Holdings B.V., SAISON
SAS Catering Hellas S.A.
SAS Grand Hotel, Beijing, Joint Venture Co. Ltd., PEKZH
SAS Palais Hotel AG, VIEZH
SAS Royal Viking Hotel AB, TOZS
SAS Scandinavia Hotel A/S, CPHZA-1
SAS Trading Uruguay
Scanator AB
Scancenter A/S
Scandinavian Aero Engine Services AB
Scandinavian Info Link AB
Scandinavian Multi Access Systems AB
Scandinavian Multi Access Systems Danmark A/S
SIHSKA A/S, SIHSKA
Skipspost A/S
SMART Norge A/S
SMART Sverige AB
Soervanger Invest 8612
Son Corp S.A.
Spanair S.A.
Stavanger Realia K/S
Stockholm Convention Bureau
Sunet S.A.
Sunwing Hellas S.A.
Tekirova AS
Tenerife Sol S.A.
Tenk S.A.
Terminal Drift A/S

Toivelomat OY
Top of Europe A/S
Top of Europe A/S, TOE
Travel Academy AB
Travel Card AB
Uqqak Servisi Anonim Sirketi (USAS)
Vaterland Bussterminal A/S
VHH Vereinigte Hotel-Holding GmbH, VHH
Viajes Astral Canarias S.A.

VIAÇAO AÉRA RIO-GRANDENSE (VARIG)

Parent Company

Fundaçao Ruben Berta

Subsidiaries (Except Wholly Owned Subsidiaries)

Agripec S.A. Agropecuária Ind. Com Exportação
BANCO VARIG S.A.
Cia. Tropical de Hotéis
Cia. Tropical de Hotéis da Amazônia
Cia. Tropical de Hotéis do Nordeste
Cia. Tropical—Hotel Tambaú
Expressão Brasileira de Propaganda, Ltda.
Hotel de Bahia S.A.
Icaro Editora, Ltda.
Interlocadora S.A.
Rio-Sul Serviços Aéreos Regionais S.A.
Serviços Auxiliares de Transporte Aéreo S.A.
Sociedade Brasileira de Turismo Aéreo—"ROTATUR", Ltda.
Varig S.A. Arrendamento Mercantil
Varig Trading S.A.

Supreme Court, U.S.
FILED
FEB 21 1992
OFFICE OF THE CLERK

No. 90-1604

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

DAN MORALES,
ATTORNEY GENERAL OF TEXAS,
Petitioner,
v.

TRANS WORLD AIRLINES, INC., *et al.*,
Respondents

REPLY BRIEF ON THE MERITS

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February 1992

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Respondents

REPLY BRIEF ON THE MERITS

Petitioner Dan Morales files this reply to the brief on the merits filed herein by the respondent airlines and to the several briefs filed by *amici curiae* in support of the respondents.

ARGUMENT

1. The NAAG Guidelines are irrelevant to this case.

In their brief, the airlines pretend that this case turns on something that it does not—narrow preemption of the NAAG Guidelines—rather than what it does—broad denial of the rights of the states to en-

force their own laws when airlines violate those laws.

The Court granted review of this case based on the question presented by the State:

> Can airlines falsely advertise air fares in Texas, in total disregard of state law prohibitions, merely because the federal government has pre-emptive regulatory authority over an airline's "rates, routes, or services" under the Federal Aviation Act?

Pet. for Cert. at i. In their brief, the airlines recast that question as:

> Whether section 105(a)(1) of the Airline Deregulation Act, which provides that "no State . . . shall enact or enforce any law . . . or other provision having the force and effect of law relating to rates, routes, and services of any air carrier," bars Texas and other states from enforcing detailed rules that specify what air carriers may and may not say when advertising rates.

Resp. Br. at i.

a. The airlines have recast the question before this Court because they apparently hope to deceive the Court about the facts of this case, just as they have deceived Texas citizens about the facts behind their fares. Recognizing the inherent weakness of an argument urging the pre-emption of general consumer protection laws, Resp. Br. at 23-24, the airlines now tell the Court that the only issue is the threatened enforcement of the NAAG Guidelines, and they rewrite the history of this case to support this revisionist theory.

For example, the airlines tell the Court that the district court "preliminarily enjoined the Attorney General of Texas, and also the attorneys general of thirty-three other states who had intervened as defendants, from *enforcing the NAAG Guidelines* in the guise of state consumer protection law." Resp. Br. at 13-14 [emphasis added]. This is false. In truth, the district court's preliminary injunction enjoined the attorneys general from:

> initiating any enforcement action pursuant to Tex. Bus. & Comm. Code §§17.41 et seq., or any other provision of state law, which would seek to regulate or restrict any aspect of the individually named plaintiff airlines' air fare advertising or the operations involving their rates, routes and/or services.

App. to Cert. Pet. at 50a. The permanent injunction was essentially the same; it barred the attorneys general from:

> initiating any enforcement action or actions pursuant to any provision of state law, which would seek to regulate or restrict any aspect of the individually named Plaintiff airlines' air fare advertising or their other operations involving their rates, routes and/or services.

App. to Cert. Pet. at 10a. Although both the preliminary injunction order and the final judgment granting the permanent injunction contained discussion of the NAAG Guidelines, App. to Cert. Pet. at 48a-49a and 9a, neither injunction was as narrow as the airlines now tell the Court. In truth, the injunctions enjoin enforcement of any state laws that "regulate or restrict any aspect of the individually named Plaintiff airlines' air fare advertising or their other operations

involving their rates, routes and/or services." App. to Cert. Pet at 9a.[1]

In another false statement to the Court, designed to bolster the argument that there is a live case or controversy relating to the NAAG Guidelines, the airlines say that Texas and other states wrote to airlines and "demanded that airlines 'bring their advertisements into compliance with the standards delineated in [those] guidelines.' " Resp. Br. at 15, quoting J.A. 123a.[2] In fact, the full quotation, contained in a

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1 The airlines also mislead the Court when they say that the other 33 attorneys general had "intervened as defendants," Resp. Br. at 13. In fact, the district court rejected the airlines' position that the other attorneys general be deemed intervenors, and instead permitted the airlines to amend their complaint to add those attorneys general as defendants, pursuant to F. R. Civ. P. 19. App. to Cert. Pet. at 60a. The Court of Appeals, while noting in dictum that "it appears to us that the thirty-three attorneys general became *de facto* intervenors," affirmed the order of the district court permitting the airlines to amend. App. to Cert. Pet. at 42a-43a. In its brief filed at the certiorari stage of this case, the United States advised the Court that the courts below clearly erred in these rulings, and recommended a summary reversal on this point. Br. for the United States as Amicus Curiae at 14-16.

2 The airlines repeat this false statement in at least two other places. Resp. Br. at 12 and 13.

In still another attempt to mischaracterize what Texas has done, the airlines claim that "the states make no secret of the fact that they intend directly to affect 'the terms and conditions of discount airline fares as well as the advertising of those fares.' App. C, *infra*, at 24a." Resp. Br. at 38. In fact, that quotation is contained in a letter *from* the Federal Trade Commission *to* a deputy attorney general in California, wherein the Commission says that the NAAG Guidelines *could* have such an effect. Far from being an admission by Texas or any other state, the quoted

memorandum from those states to airlines and other interested parties, says that *"most airlines are making a concerted effort to* bring their advertisements into compliance with the standards delineated in [those] guidelines." J.A. 123a [emphasis added]. That memorandum did say that "in the opinion of the states signing this memorandum, the failure to include any non-optional costs in the advertised price is *a violation of our respective state laws on deceptive advertising and trade practices.*" J.A. 123a [emphasis added]. Nowhere in this memorandum nor anywhere else in the record does Texas or any other state threaten to sue any airline to enforce the NAAG Guidelines. The states only seek to enforce their general consumer protection laws.[3]

b. Why do the airlines mischaracterize this case? They concede that the NAAG Guidelines are not law. Resp. Br. at 17. Here, they agree with the Court of Appeals. App. to Cert. Pet. at 15a. They also agree with the State, which has consistently attempted to turn the focus to the law and away from the NAAG Guidelines. Pet. Br. at 6.

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language is speculation by an agency opposed to what the states were doing.

The airlines' use of inaccurate and misattributed quotations belongs more in an advertisement for a mediocre movie than in a Supreme Court brief.

3 For further proof, see the suit Texas actually filed against Pan American World Airways, Inc., in Texas state court. J.A. at 189a-197a. This suit did not mention the NAAG Guidelines, but rather sought relief specific to Pan Am's deceptive advertisements pursuant to the Texas Deceptive Trade Practices Act. J.A. 191a-197a. That case was later removed to federal court and made a part of this case, over the objection of Texas. App. to Cert. Pet. at 43a-45a.

They mischaracterize in order to convince the Court that there is something to pre-empt, if the Court reads the pre-emption of the Federal Aviation Act to be as broad as ERISA pre-emption, as the airlines urge and the State opposes. Under ERISA, a state statute is pre-empted "if it has a connection with or reference to" an employee benefit plan. *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96-97 (1983). Therefore, the airlines argue, Texas law is pre-empted if it has such a connection with or reference to fares. Resp. Br. at 18. The Texas Deceptive Trade Practices Act does not meet either prong of this test. It has no connection with fares whatsoever—it is a general law against deceptive practices. *See Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 308 fn. 11 (1988); *Mackey v. Lanier Collections Agency*, 486 U.S. 825 (1988). By the same token, it has no reference to fares. As well, the Texas law functions irrespective of the existence of the FAA and the presence or absence of federal regulation. *Ingersoll-Rand Co. v. McClendon*, 111 S.Ct. 478, 483 (1990). The Texas law does not fall within the scope of ERISA pre-emption.

But, indeed, the NAAG Guidelines do refer to fares, as the airlines correctly say. Resp. Br. at 18. They may also be construed as having a connection with rates, as the airlines urge. Resp. Br. at 18. Thus, if the Court can be made to believe that Texas sought to "enforce" the NAAG Guidelines *and* if the Court accepts the airlines' contention that ERISA pre-emption is coextensive with FAA pre-emption, then the airlines have found a bird's nest on the ground.[4]

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4 Of course, as discussed at length in the State's Brief on the Merits, at 33-36, ERISA is inapposite. But this point will not be repeated here.

Therefore, the airlines set about the task of convincing the Court that the question of pre-emption in this case arises from "the states' threatened enforcement of the new industry-specific standards contained in the NAAG Guidelines, not the routine enforcement of general consumer protection laws." Resp. Br. at 21. However, because all the states ever attempted is indeed the "routine enforcement of general consumer protection laws," the airlines have attempted the deception set forth above. This deception fails, as must the position it was intended to support.

The NAAG Guidelines have neither the force nor the effect of law, as the pre-emption section requires. 49 U.S.C. § 1305(a)(1). The Guidelines have never been presented as anything other than an extremely informal Restatement of Torts relating state consumer protection laws to airline practices, which "restate individual states' false advertising and deceptive practices statutes as they apply to air fare and price advertising," in order to "give an airline a reasonable expectation that it will not be sued if it follows the Guidelines. . . . If an airline does not choose this safe harbor and instead ventures into untested waters, it may run aground and it may not. But it is free to do so." Commentary to NAAG Guidelines, reprinted in App. to Br. for the United States as Amicus Curiae, at 18a and 15a.

2. Congress did not intend to deregulate all aspects of airline practices, nor did it intend to prevent parallel state regulation in the areas where it did not deregulate.

All of the many briefs filed in this case attempt, through a variety of approaches, to convince the Court what Congress set out to achieve in the

Deregulation Act. A corollary approach asks what Congress did not intend.

Of relevance to this discussion is the fact that Congress left untouched the authority of the federal agency to deal with "unfair or deceptive practices or unfair methods of competition." 49 U.S.C. § 1381(a). Congress did not intend to deregulate federal authority over these practices, or it would have had to revise this section.

Indeed, Congress even stressed its intent for federal authority to continue in this area, perhaps even with renewed vigor, in requiring the Board (now the Department) to consider, in the exercise of its powers and duties, the "prevention of unfair, deceptive, predatory, or anticompetitive practices in air transportation . . .." 49 U.S.C. § 1302(a)(7).

Congress thus expressed its intent that deceptive and anticompetitive practices continue to be regulated, rather than being left to market forces, as it intended with respect to controlling rates, routes, and services. At the same time, it gave no indication that it intended to take from the states their historic police powers to enforce their consumer protection laws relating to those deceptive and anticompetitive practices.

The airlines desire that the Court support the judicial activism that took place below, which went far beyond the express intent of Congress and encroached into an area that Congress explicitly chose not to deregulate.

3. The extent of pre-emption urged by the airlines sweeps impermissibly and unavoidably broad.

As discussed in the State's brief on the merits, Pet. Br. at 13, and in a brief of *amici*, Public Citizen Br. at 9-11, if one accepts the broad reading of the pre-emption section urged by the airlines, the sweep of that pre-emption is far broader than Congress could have intended. In an honest effort to answer this argument, the Solicitor General proposes that pre-emption can be limited in its sweep, even if one adopts the broad ERISA-type pre-emption. Br. for the United States as Amicus Curiae Supporting Respondents, at 17, 25, and 29.[5]

The Solicitor General says, first, that state laws prohibiting gambling, prostitution, or the sale of illegal drugs, tort actions arising from plane crashes, and the like, "do not relate to rates, routes, or services *in a manner implicating competition or the pro-competitive policies* of the Deregulation Act." *Id.* at 17 [emphasis added].[6] Later in its brief, the Solicitor General expands on this point, saying that the pre-emption section "was designed to preclude not only state laws reimposing the direct controls on rates, routes, and services that Congress abolished, but also laws relating to those matters that could *interfere*

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5 The airlines also allude to this argument. Resp. Br. at 16. However, because the United States makes the arguments in greater detail, those arguments will be discussed here.

6 This assertion itself ignores the fact that competition can unfortunately come in many guises. In fact, it is possible to conjecture that an airline which opened up its terminal locations to slot machines would draw certain passengers away from its competitors.

with the pro-competitive policies that federal authorities were directed by Congress to implement." *Id.* at 25 [emphasis added]. The highlighted portions of these arguments appear to depart from a strict construction of Congress' intent in adopting the express pre-emption section and to venture into a divination of Congress' implicit intent to pre-empt beyond the mere language of the Act. This is confirmed when the Solicitor General concludes that the pre-emption section "is fairly construed to *protect the pro-competitive regulatory judgments* mandated by the Deregulation Act's statement of policy from this type of conflict." *Id.* at 29 [emphasis added].[7]

The flaws in an implicit pre-emption argument are detailed in the next section of this brief. At this point, it must be stressed that there is nothing in either the Act itself or in the legislative history to suggest that Congress intended the meticulous line-drawing the Solicitor General suggests. Under the ERISA cases, if a state law relates to employee benefit plans, that is the end of the inquiry—that law is pre-empted, even if it appears to be consistent with ERISA's substantive requirements. *Mackey v. Lanier Collections Agency*, 486 U.S. 825, 829 (1988). So must the case be with respect to this Act, if the ERISA standard is applied. Texas believes that the extremely

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7 Perhaps it was to just those sorts of state regulatory actions that might "relate to" rates, routes, or services, but did not conflict with the Department's internal policy, that the Department had in mind when it wrote to a deputy attorney general in California. The Department's general counsel noted that, although some of the Guidelines appeared to be pre-empted, the Department had "no objection" to other Guidelines, and further urged the states "to continue to strive for non-misleading advertising." App. to Resp. Br. at 12a and 14a.

broad sweep of this variety of pre-emption argues strongly against the conclusion that this is what Congress intended. Congress certainly evinced no desire for a case-by-case consideration of the competitive impact of any given state law or the enforcement thereof.

4. There is no implicit pre-emption of state regulation of deceptive airline advertising.

The court of appeals relied on the express pre-emptive effect of the FAA's pre-emption clause and did not reach the question of implied pre-emption. App. to Cert. Pet. at 34a.

As an initial principle, the Court should confirm that it is both unnecessary and inappropriate to search for additional implicit pre-emption when Congress has expressly ordained limited statutory pre-emption. The inquiry should begin and end at the language of the statute. After the scope of the explicit statutory pre-emption is established, for a court to go looking for possible additional implicit pre-emption outside the statute does violence to the presumption against pre-emption. Once Congress has spoken, it is inappropriate for courts to attempt to go beyond what Congress ordained. The Court has frequently said that one looks for possible implicit pre-emption *in the absence of* explicit statutory language. *E.g., Wisconsin Public Intervenor v. Mortier*, 111 S.Ct. 2476, 2481 (1991); *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 299-300 (1988). The Court should now affirm that one looks for implicit pre-emption *only* in that absence.

However, both the airlines and several of the *amici* argue for implicit pre-emption, based on

asserted conflicts with federal law.[8] Therefore, the State will reply to these claims. The prior opinions of the Court relating to implied pre-emption shows that there is none in this case.

In the absence of express pre-emption, Congressional intent to supersede state law may be implied when (1) Congress has chosen for the federal government to occupy a particular field or (2) state and federal regulations actually conflict. *Wisconsin Public Intervenor v. Mortier*, 111 S.Ct. 2476, 2481-2482 (1991) and cases cited therein.

Congress has indicated that it did not intend to occupy the entire field of airline regulation. *Wardair Canada v. Florida Dept. of Revenue*, 477 U.S. 1, 6 (1986); *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290, 301 (1976). Otherwise the pre-emption clause and the saving clause would be meaningless surplusage. *Wisconsin Public Intervenor v. Mortier*, 111 S.Ct. 2476, 2486 (1991).

As well, there is no impossible conflict between state and federal regulation. There is no conflict created by either (a) compliance with both state and federal law or (b) state law creating an obstacle to the federal purpose.

a. As discussed in Pet. Br. at 20, the current federal regulations are virtually identical to the enforcement position taken by Texas. Even if the DOT regulations invalidated in *Alaska v. U.S. Department of Transportation*, 868 F.2d 441 (D.C. Cir. 1989), dis-

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8 *E.g.*, Resp. Br. at 40-46; Br. of the United States as Amicus Curiae Supporting Respondents at 24-29; and Br. of the American Association of Advertising Agencies, Inc. *et al.*, as *Amici Curiae* in Support of Respondents at 18-23.

cussed in Pet. Br. at 27, were to be the law, there would still be no problem with complying with both Texas law and less-stringent federal regulation.

As to the only matters on which there is a true case or controversy—whether or not surcharges can be excluded from the advertised fare—no airline is put to the pain of complying with state law only by violating federal law. For example, in the advertisement that formed the basis of the State's suit against Pan Am, the airline had advertised a $149 fare to Europe and other destinations. J.A. 192a. In fact, the $149 advertised fare was for only one way of a required round-trip purchase, and surcharges totalling an additional $23 were omitted from that price, and were only disclosed in the fine print of the advertisement. J.A. 193a. Therefore, the actual cost of the ticket was $321. The State of Texas interprets its consumer protection law (not the NAAG Guidelines) to require disclosure of the full $321 fare. The Department of Transportation has stated that its enforcement policy would permit what Pan Am had done. Brief for the United States as Amicus Curiae Supporting Respondents at 27-28.[9]

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9 The Department has also proposed to reverse the existing federal regulation, which prohibits practices of this nature, to permit such practices. However, nearly three years after proposing this turnaround, the Department has still not made the proposal a final, and appealable, regulation. *See* Pet. Br. at 27. The airlines insist on treating this proposed change as though the rulemaking requirements of the Administrative Procedure Act were a nullity and these proposals were now the law. Resp. Br. at 43-44. They are not the law and should not be understood as such. The airlines' reliance on this proposed regulation, as a basis to find conflict pre-emption, is simple grasping at straws.

The airlines can easily comply with both standards, merely by disclosing the full $321 fare. Neither the Department's informal enforcement policy nor its proposed regulation prevent full disclosure—they merely do not mandate it. There is no "impossibility of dual compliance" requiring pre-emption. *Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963); *Wisconsin Public Intervenor v. Mortier*, 111 S.Ct. 2476, 2482 (1991).[10]

b. In addition to an impossible conflict of laws, a second variety of conflict pre-emption will be found "where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress." *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 300 (1988). The test is "whether both regulations can be enforced without impairing the federal superintendence of the field, not whether they are aimed at similar or different objectives." *Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963).

As discussed in Pet. Br. at 11-13, the state law fulfills Congress' intent to have a fully-competitive marketplace. In addition, the current federal law and state law are complementary, Pet. Br. at 19-28, despite the Department's decision not to enforce current regulations, Pet. Br. at 27.

c. Although the airlines and the *amici* make much of the conjectured reduction in fare advertising if the states are not pre-empted, *e.g.*, Resp. Br. at 37, this argument fails for two reasons. First, the argument is based on the insistence that every NAAG

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10 The Ninth Circuit reached similar conclusions in *West v. Northwest Airlines, Inc.*, 923 F.2d 657, 661 (9th Cir. 1991), *petition for cert. pending*, No. 91-505.

Guideline will be forced upon the airlines with respect to every advertisement. As discussed above, in Section 1, the Guidelines are not mandatory law, but only suggestive of ways in which airlines may comply with state consumer protection laws, and Texas has never required any airline to comply with any Guideline. All this case is really about is the right of Texas to insist that an airline disclose the full fare a customer must pay, when the airline *chooses* to advertise a fare, as required by state law.

Second, this conjectured ill effect ignores the fact that some airlines did include all surcharges in their advertised fares for virtually all of 1988 with no apparent reduction in fare advertising. J.A. 118a and 123a. If this real-world test of the airlines' hypothesis had proven that hypothesis correct, it is reasonable to assume that the airlines would have brought that into the record in this case. Since the real world disproved the airlines' hypothesis, they now merely restate the hypothesis and hope that imagination will succeed where reality did not.[11]

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11 Because the district court entered its preliminary injunction after a brief, non-evidentiary hearing, the record contains no testimony. The State sought a stay of proceedings, to enable it to prepare, but this stay was not granted. The only evidence in this case consists of affidavits whose authors were not subject to cross examination. For this reason, the record facts that are actually before the Court are sketchy at best. Texas brings such facts as exist to the Court's attention, but does not wish to suggest that any of these facts are dispositive.

The fact that the district court granted a preliminary injunction after a non-evidentiary hearing that was to be limited to consideration of a temporary injunction only, Tr. at 14:19-15:14, serves to underscore the radical judicial activism of the courts below.

Once one gets past the roadblock of express pre-emption, implied pre-emption is no more than a speed bump over which one may cautiously but safely pass.

5. The pre-emption section does not apply to foreign air carriers.

The foreign air carriers are improperly before the Court. The pre-emption section applies only to "air carriers." 49 U.S.C. § 1305(a)(1). An "air carrier" is defined as "any citizen of the United States, who undertakes . . . to engage in air transportation . . .." 49 U.S.C. § 1301(3). A "foreign air carrier" by contrast is separately defined as "any person, not a citizen of the United States, who undertakes . . . to engage in foreign air transportation." These two terms are mutually exclusive and are terms of art. Elsewhere in the Act, Congress refer to both "air carriers" and "foreign air carriers" in another section relating to deceptive practices. 49 U.S.C. § 1302(a)(3). The pre-emption section, on the other hand, does not mention and therefore does not apply to foreign carriers.

This distinction is logical when one considers Congress' intent to prevent the states from engaging in utility-type regulation of airlines, after deregulation. Before 1978, states had tried to set rates for domestic "air carriers" but had never attempted or intended to set the rates of "foreign air carriers." Because there was no past history of state activity with respect to foreign air carriers, and thus no need to invoke the extraordinary effect of pre-emption, Congress wisely chose to limit the effect of the pre-emption section to domestic "air carriers."

The foreign air carriers cannot use the pre-emption section to establish either federal court jurisdiction or a federal-law-based claim, and are thus improperly included in this suit.

This results, if one accepts the airlines' construction of the pre-emption section, in the fully-anomalous result that foreign air carriers are subject to state consumer protection laws, but not domestic air carriers. Congress could not have intended this result.

CONCLUSION

Arguments can be made on both sides of the pre-emption issue before the Court, and these arguments have in fact been made, at length and in near-infinite variety. All arguments reduce to one point, whether or not sound public policy as determined by Congress favors pre-emption of state authority to enforce state consumer protection laws when confronted with specific acts of deception by airlines. The variety of arguments should drive home one point—Congress has not unmistakably ordained one specific course for the Court to follow. Texas urges that the better choice in this event is to choose the course that does no harm to federalism, by permitting the state the narrowly-crafted enforcement of its laws which it would do, and not to preclude the state from enforcing its laws, based on the speculations and mischaracterizations of the airlines herein.

For the reasons stated herein and in petitioner's brief on the merits, the judgments of the courts below should be reversed.

Respectfully submitted,

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No. 90-1604

Supreme Court, U.S.
FILED
FEB 13 1992
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1991

DAN MORALES, ATTORNEY GENERAL OF TEXAS,
PETITIONER

v.

TRANS WORLD AIRLINES, INC., ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

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QUESTION PRESENTED

Whether Section 105(a)(1) of the Airline Deregulation Act of 1978, 49 U.S.C. App. 1305(a)(1), which preempts "any" state laws "relating to rates, routes, or services of any air carrier," preempts state regulation of the content and format of air fare advertisements.

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In the Supreme Court of the United States

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DAN MORALES, ATTORNEY GENERAL OF TEXAS,
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ON WRIT OF CERTIORARI
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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

INTEREST OF THE UNITED STATES

Under the Federal Aviation Act of 1958, 49 U.S.C. App. 1301 *et seq.*, the Department of Transportation has authority to regulate certain aspects of the airline industry. In particular, Section 411(a) of the Act, 49 U.S.C. 1381(a), empowers the agency to take administrative action against unfair or deceptive practices in the airline industry. DOT has frequently exercised that authority with respect to allegedly deceptive air fare advertising, attempting simultaneously to protect the public from deceptive practices and to foster price competition among air carriers.

This case presents the question whether detailed state controls on the content and format of air fare advertising are preempted by Section 105(a)(1) of the Airline Deregulation Act of 1978, 49 U.S.C. App. 1305(a)(1). The answer to that question is of considerable importance

to DOT. DOT is concerned that conflicting and overlapping state regulation of air fare advertising could interfere with the congressionally mandated goal of fostering competition in air transportation. DOT's policy with respect to air fare advertising, as reflected in a number of enforcement orders, is in conflict with some of the state standards at issue in this case.

In response to an order by this Court inviting the Solicitor General to express the views of the United States, we filed a brief in connection with the petitions in this case and in No. 90-1606.

STATEMENT

The district court entered an injunction prohibiting petitioner from enforcing detailed state restrictions on the form and content of air fare advertising. The court of appeals upheld the injunction, holding that the contemplated state regulation was preempted by Section 105(a)(1) of the Airline Deregulation Act of 1978 [the Deregulation Act], 49 U.S.C. App. 1305(a)(1). That statute provides, with an exception not relevant here, that "no State or political subdivision thereof and no interstate agency or other political agency of two or more States shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of" interstate and foreign air carriers.

1. The United States Department of Transportation has statutory authority to take administrative action against allegedly deceptive practices, including those involving advertising. Under Section 411(a) of the Federal Aviation Act, 49 U.S.C. App. 1381(a), DOT is empowered, "if it considers that such action by it would be in the interest of the public," to "investigate and determine whether any air carrier, foreign air carrier, or ticket agent has been or is engaged in unfair or deceptive practices or unfair methods of competition in air transportation or the sale thereof."[1] In addition to the

[1] Prior to 1985, the Civil Aeronautics Board was responsible for enforcing Section 411. When that agency was abolished, its Section 411 authority was transferred to DOT. Civil Aeronautics Board Sunset Act of 1984, Pub. L. No. 98-443, § 7(a), 98 Stat. 1706.

cease and desist orders authorized by that Section, DOT has authority to assess civil penalties. 49 U.S.C. App. 1471(a), 1475.

Congress has required DOT to exercise its regulatory powers, including its authority to address deceptive practices, in accordance with specified criteria. 49 U.S.C. App. 1302(a). Those criteria require DOT to give due consideration to the goals, among others, of eliminating unfair or deceptive practices and encouraging "an air transportation system relying on actual and potential competition to provide efficiency, innovation, and low prices, and to determine the variety, quality, and price of air transportation services." 49 U.S.C. App. 1302(a)(3), (4), (7) and (9).

Since 1985, DOT has issued more than 60 cease and desist orders under Section 411 and has assessed civil penalties totalling more than $1.8 million. Nine of the orders, and more than $265,000 of the civil penalties, have involved unfair or deceptive airline fare advertising.[2] DOT has issued a proposed regulation that would codify certain aspects of its policy, as reflected in a number of enforcement orders, regarding such advertising. 54 Fed. Reg. 31,052 (1989).

2. a. The National Association of Attorneys General (NAAG) is a voluntary association, comprised of representatives of the attorneys general of the 50 States, various territories, and the District of Columbia. In

[2] *E.g.*, *American Airlines, Inc.*, DOT Order No. 91-9-45 (Sept. 20, 1991); *Continental Airlines, Inc.*, DOT Order No. 90-3-8 (Mar. 6, 1990); *Trans World Airlines, Inc.*, DOT Order No. 89-7-15 (July 13, 1989); *Pan American World Airways, Inc.*, DOT Order No. 89-4-25 (Apr. 11, 1989). Order No. 89-7-15 was a consent order assessing a $20,000 penalty for the advertisement discussed at pages 23-24 of petitioner's brief. In other cases, airlines have modified advertisements in response to warnings by DOT, or DOT's Consumer Affairs Office has resolved consumer complaints in situations where enforcement action would not have been appropriate.

1987, a NAAG task force undertook a study of advertising and marketing practices in the airline industry, giving particular attention to airline advertising, frequent flyer programs, and compensation for denied boarding. Pet. App. 36a-37a. Based upon that study, in December 1987, NAAG adopted Air Travel Industry Enforcement Guidelines. See National Ass'n of Attorneys General, Task Force on the Air Travel Industry, *Guidelines and Commentary* (Apr. 1988) [*NAAG Guidelines* or *Guidelines*].[3] The *NAAG Guidelines* include detailed standards regarding, among other things, the content and format of advertising by airlines.[4]

The *Guidelines* provide that any print, broadcast, or billboard advertisement which "provides air fares or other price information must be in plain language, clear and conspicuous, and non-deceptive." U.S. Br. App. 18a; see *id.* at 12a. For each form of advertising, the *NAAG Guidelines* specify what disclosures must be made to render an advertisement "non-deceptive," the format that must be followed to assure a "clear and conspicuous" presentation, and the content of certain disclosures. *Id.* at 13a-14a, 18a-28a. In the case of printed advertisements, the *Guidelines* prescribe disclosure in type of a certain size, depending on the size of the advertisement, *id.* at 13a; set forth a detailed list of restrictions that must be stated when applicable, *id.* at 18a-19a, 24a-25a; and provide examples of wording that is sufficient or insufficient to convey those restrictions, *id.* at 19a-20a, 24a-25a. Comparable standards are established for broadcast and billboard advertisements. *Id.* at 13a-14a, 21a-24a.

The *NAAG Guidelines* also specify the manner in which advertised fares themselves must be presented. The "total advertised price" must include any fuel, tax,

[3] The guidelines were reproduced as Appendix B to the brief we filed in connection with the petitions for certiorari in this case and in No. 90-1606 [hereinafter U.S. Br. App.].

[4] The *NAAG Guidelines* also contain detailed requirements for frequent flyer programs, as well as for offers of compensation to persons for voluntarily denied boarding. U.S. Br. App. 28a-41a.

or other surcharge. U.S. Br. App. 26a. If the advertised one-way price is available only as part of a round-trip purchase, "this restriction, together with the full round-trip fare, must be advertised in a clear and conspicuous manner, at least as prominently as the one-way fare." *Id.* at 26a-27a. Finally, certain restrictions must be observed on use of the words "sale," "discount," "reduced," or similar terms. *Id.* at 27a.

The *NAAG Guidelines* disclaim any intention to "create any new laws or regulations regarding the advertising practices or other business practices of the airline industry." U.S. Br. App. 11a. They purport instead to "explain in detail how existing state laws apply to air fare advertising and frequent flyer programs." *Ibid.*

b. Both DOT and the Federal Trade Commission opposed the *NAAG Guidelines*.[5] In particular, DOT expressed its view that certain *Guidelines* relating to advertising and round trip pricing "are preempted by Federal law." 1988 DOT Letter, at 1. DOT also noted that the *Guidelines* in question would be inconsistent with its enforcement policy. *Ibid.*

Similarly, the FTC opposed the proposed *NAAG Guidelines* on the grounds that they "might result in inconsistent federal and state regulation" and that they "ignore[d] the important question of federal preemption." 1987 FTC Letter, at 2. Referring to Section 105's preemption of state laws "relating to rates, routes, or services," the FTC observed that the *Guidelines* "would appear to regulate rates and services indirectly, or at least have a substantial impact on them." *Ibid.* Because

[5] Letter dated October 1, 1987, to Christopher M. Ames, Deputy Attorney General of California, from Benjamin Berman, Acting Secretary of the FTC [hereinafter 1987 FTC Letter]; Letter dated March 11, 1988, to Mr. Ames, from Emily H. Rock, Secretary of the FTC [hereinafter 1988 FTC letter]; Letter dated March 2, 1988, to petitioner from B. Wayne Vance, General Counsel of the U.S. Department of Transportation [hereinafter 1988 DOT Letter]. These letters were exhibits 2, 9, and 14 to respondents' motion for a temporary restraining order in the district court.

"[t]he Department of Transportation already regulates airline advertising under section 411 of the Federal Aviation Act, [49 U.S.C. App. 1381]," the Commission continued, "the guidelines would impose duplicative and often inconsistent requirements." *Id.* at 3.

The FTC also expressed opposition to the *Guidelines* on their merits. It noted that the *Guidelines* "could have the unintended consequence of substantially inhibiting effective price competition among the airlines," 1987 FTC Letter, at 2, and went on to explain at some length why the sorts of restrictions NAAG was considering would place an undue burden on advertising and tend to discourage discount air fares, *id.* at 3-4. See 1988 FTC Letter, at 5-6 (reiterating those concerns).

3. a. In February 1988, the attorneys general of Texas, Colorado, Kansas, Massachusetts, Missouri, New York, and Wisconsin sent a memorandum to the major airlines in which they expressed the intention to enforce, through state law, provisions of the *NAAG Guidelines* requiring advertisements to include all fees in the stated fare for a given flight. J.A. 123a-125a. In November of the same year, petitioner, the Attorney General of Texas, sent "notice of intent to sue" letters—on behalf of Texas, California, Massachusetts, New York, and Washington—to respondents Trans World Airlines, Inc. (TWA), Continental Airlines, Inc. (Continental), and British Airways PLC (British Air). J.A. 60a-63a, 76a-79a, 97a-100a. The letters charged that certain of those airlines' advertisements were deficient in failing to include fuel, tax, or other surcharges in the advertised fares. *Ibid.* Respondents were told that if they continued to engage in such practices after December 1, 1988, they would "be subject to being sued without further notice or opportunity to cure." *Ibid.* Finally, while noting that DOT allowed separate presentation of certain charges for air transportation, petitioner warned that compliance with DOT standards would not foreclose prosecution. *Ibid.*

b. In January 1989, respondents TWA, Continental, and British Air commenced this action against petitioner.

J.A. iiia; see J.A. 1a-32a.[6] The complaint alleged, *inter alia*, that Section 105(a)(1) of the Deregulation Act preempts enforcement of the *NAAG Guidelines* through the Texas Deceptive Trade Practices Consumer Protection Act, Tex. Bus. & Comm. Code Ann. §§ 17.41 *et seq.* (Vernon 1987). J.A. 10a. Respondents sought a declaratory judgment to that effect, along with preliminary and permanent injunctive relief.

The district court entered a preliminary injunction, finding that respondents were likely to prevail on their contention that "state regulation of advertising of [respondents'] rates, routes, and services has been preempted by the Federal Government" and that "the threatened enforcement action by [petitioner] and others in concert or participating with him would be in violation of the Supremacy Clause of the United States Constitution." Pet. App. 49a. In a subsequent order, the court extended its preliminary injunction to 33 other States. *Id.* at 60a-63a.

c. The court of appeals affirmed. Pet. App. 13a-47a. The court upheld the district court's determination that respondents were likely to prevail on their preemption claim, concluding that "state laws proscribing deceptive advertising are preempted by [Section 105(a)(1) of the Deregulation Act] when a state attempts to enforce such laws against the advertising of fares by interstate and international airlines." *Id.* at 25a. With respect to the language of the statute, the court noted that "a law relates to a particular subject 'if it has a connection with or reference to' that subject." *Id.* at 33a (quoting *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85, 96-97 (1983)). Here, the court continued, because "[i]t cannot be gainsaid that enforcement of a state law regulating fare advertising by airlines has a connection with or reference to rates within the meaning of § 1305(a)(1)," "such state action is expressly preempted by" that section. Pet. App. 33a.

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[6] The remaining airlines-respondents intervened in this case at a later point. Pet. App. 16a.

The court of appeals found further support for that conclusion in "the history of federal legislation regulating airlines." Pet. App. 31a. When authority to regulate deceptive practices was transferred from the CAB to DOT, the court found, "Congress intended to retain in the federal government * * * exclusive authority over airline advertising of fares." *Id.* at 33a. The court also rejected petitioner's contention that the Federal Aviation Act's general savings provision, 49 U.S.C. App. 1506, protects state regulation of air fare advertisements from preemption, finding that that provision "does not preserve state law remedies when there is express preemption under § 1305." Pet. App. 33a. This Court denied certiorari. 111 S. Ct. 307, 308 (1990).

4. On remand, the district court entered a final injunction, ruling that Section 105(a)(1) of the Airline Deregulation Act of 1978 preempts direct state regulation of air fare advertisements. Pet. App. 8a-12a. The court of appeals affirmed on the basis of its earlier opinion. *Id.* at 1a-7a.[7]

INTRODUCTION AND SUMMARY OF ARGUMENT

Between 1938 and 1978, the federal government exercised comprehensive regulatory control over the interstate and foreign air carrier industry. Under the Civil Aeronautics Act of 1938, ch. 601, 52 Stat. 980, and the Federal Aviation Act of 1958, Pub. L. No. 85-726, 72 Stat. 731, the CAB regulated entry into the industry, and airlines were required to obtain CAB approval of fares and routes. Looking back at this regime in the mid-1970s, Congress adjudged it an anticompetitive failure. See S. Rep. No. 631, 95th Cong., 2d Sess. 2-4 (1978); H.R. Rep. No. 1211, 95th Cong., 2d Sess. 1-3 (1978). Not a single new trunk air carrier had been permitted to institute

[7] Two petitions seeking review of this judgment were filed—one by Texas and the other by the other 33 States bound by the injunction. This Court granted Texas's petition, which presents only the question whether Section 105 of the Deregulation Act preempts enforcement of the *NAAG Guidelines* through Texas's consumer protection statute.

service, carrier management was largely barred from competing on price, and capacity agreements among airlines allowed them to set the amount of service in various markets. *Ibid.*

With the enactment of the Airline Deregulation Act of 1978, Congress sought to promote a competitive market in the industry. "[T]his new, comprehensive legislation * * * entirely overhaul[ed] the aviation regulatory system." H.R. Conf. Rep. No. 1779, 95th Cong., 2d Sess. 56 (1978). It removed barriers to entry, phased out regulation of rates, and did away with other restrictions on potential competition. The Act also directed federal regulators to exercise their remaining authority in a manner promoting competition. 49 U.S.C. App. 1302(a)(4) and (9). The Act's ambitious objective was "to encourage, develop, and attain an air transportation system which relies on competitive market forces to determine the quality, variety, and price of air services[.]" H.R. Conf. Rep. No. 1779, *supra*, at 53.

One provision of the statute expressly preempts state laws "relating to" the three basic areas in which airlines compete. Section 105(a)(1) of the Act, 49 U.S.C. App. 1305(a)(1), provides, with an exception not relevant here, that

> no State or political subdivision thereof and no interstate agency or other political agency of two or more States shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier having authority under subchapter IV of this chapter to provide air transportation.

The fundamental dispute in this case concerns the role that Congress intended the preemption provision to play in opening the airline industry to competition. Petitioner argues that Section 105(a)(1) was designed only to prevent States from reimposing the same kinds of regulatory controls that the Deregulation Act abolished. In his view, "Congress intended to take the federal government out of the business of the economic, utility-like

regulation of the rates, routes, and services of carriers providing air transportation and, at the same time, intended to see that states did not merely step in, and by re-regulating, undo what Congress had just done."[8]

The statute does not say that. The language of Section 105(a)(1) preempts "*any* law * * * *relating to*" rates, routes, or services" (emphasis added). Congress chose not to limit preemption to state regulation "of" rates, routes, and services; Section 105(a)(1) extends to state laws "relating to" those subjects. That formulation is strikingly similar to the language of ERISA's preemption provision, 29 U.S.C. 1144(a). In construing ERISA, this Court has made clear that a law relates to a benefit plan if the law has a connection with or reference to the plan—whether or not the law was designed to affect the plan or ostensibly regulates some other matter. Section 105(a)(1) should be given the same common-sense meaning. In fact, several features of the statutory text—the reference to "any" state law, the fact that preemption extends to legal proscriptions that are not characteristic of "utility-type" regulation, and an exemption within Section 105 preserving the proprietary powers exercised by airport owners—establish that Section 105(a)(1) is not limited to direct regulation of rates, routes, and services.

The detailed state law controls on air fare advertising that petitioner has threatened to enforce "relate to" rates within the meaning of Section 105(a)(1). On their face, the *NAAG Guidelines* refer specifically to air fares. More fundamentally, advertising is the quintessential means by which airlines and other sellers communicate

[8] Pet. Br. 10. Accord 31 States Br. 5 (intent of Section 105(a)(1) was "to prevent states from adopting utility type regulations which would require airlines to charge certain prices for certain flights, fly specified routes and provide specified air transportation services"); Public Citizen Br. 7 ("Having decided to replace this public utility-style of regulation with marketplace competition, Congress also decided that it would make no sense to leave room for similar regulation at the state or local level by allowing the states to impose their own views as to what was a reasonable fare or how many airlines should serve a particular route.").

their prices to potential buyers. Especially in light of the complex fare structures that characterize the airline industry, controls on advertising have a direct impact on the market mechanisms that establish rates for air transportation. Enforcement of the *NAAG Guidelines* would burden advertising of discount fares, and thereby threaten the fares themselves.

The *NAAG Guidelines* also interfere with the implementation of pro-competitive regulatory policies set forth in the Deregulation Act. When it enacted that statute, Congress did not just withdraw direct federal controls over rates, routes, and services. It also set out new regulatory criteria requiring federal authorities to exercise their remaining authority in a manner promoting competition and protecting consumers from deception. 49 U.S.C. App. 1302(a). DOT has applied those criteria in fashioning an approach to air fare advertising that is inconsistent, in various respects, with the *NAAG Guidelines*. Section 105(a)(1) is properly construed to make room for the pro-competitive regulatory judgments that Congress mandated as well as to foreclose direct state controls on rates, routes, or services.

ARGUMENT

SECTION 105(a)(1) OF THE AIRLINE DEREGULATION ACT PREEMPTS STATE REGULATION OF THE CONTENT AND FORMAT OF AIR FARE ADVERTISING

A. Section 105(a)(1) Extends To State Laws "Relating To" Rates, Routes, and Services, Not Just To Direct Regulation Of Those Matters

In this case, Congress has expressly preempted a defined category of state laws. Accordingly, as in any other case presenting a question of statutory interpretation, it is appropriate to "begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *FMC Corp.* v. *Holliday*, 111 S. Ct. 403, 407

(1990) (quoting *Park 'N Fly, Inc.* v. *Dollar Park and Fly, Inc.*, 469 U.S. 189, 194 (1985)).[9]

1. The language of Section 105(a)(1) is "conspicuous for its breadth,"[10] and "[t]he key to" that provision "is found in the words 'relat[ing] to.'"[11] Congress chose to preclude not only state regulation "of" airline rates, routes, and services; instead, it used the broader phrase "relating to."

In that respect, Section 105(a)(1) is very similar to another preemption statute enacted four years earlier, Section 514(a) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1144(a). In general, Section 514(a) preempts state laws "insofar as they may now or hereafter relate to any employee benefit plan" within the scope of ERISA. This Court has recognized that a state law "relates to" a benefit plan, for purposes of this provision, "if it has a connection with or reference to" the plan, *Ingersoll-Rand Co.* v. *McClendon*, 111 S. Ct. 478, 483 (1990); *Metropolitan Life Ins. Co.* v. *Massachusetts*, 471 U.S. 724, 739 (1985); *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. at 96-97.[12] Preemption is not limited to "state laws specifically designed to affect employee benefit plans." *FMC Corp.* v. *Holliday*, 111 S. Ct. at 408; see *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. at 98. "[E]ven indirect state action bearing on private pensions may encroach upon the area of exclusive federal concern," *Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504, 525 (1981), and a law is not immune from preemption simply because it "ostensibly regulat[es] a matter quite different from pension plans," *id.* at 524.

[9] Amici Public Citizen and Aviation Consumer Action Project invoke a "presumption" against preemption (Public Citizen Br. 13), but the presumption is plainly overcome by the express preemption provision. The issue is then one of interpreting the statutory provision; the presumption does not resurface at every turn once it has been overcome. See, *e.g.*, *Irwin* v. *Veterans Administration*, 111 S. Ct. 453, 457 (1990) (acknowledging presumption against waiver of sovereign immunity, but then applying normal rules of statutory construction to interpret express waiver).

[10] *FMC Corp.* v. *Holliday*, 111 S. Ct. at 407 (referring to comparable language in ERISA).

[11] *Ingersoll-Rand Co.* v. *McClendon*, 111 S. Ct. 478, 483 (1990) (referring to ERISA).

[12] See *Black's Law Dictionary* 1158 (5th ed. 1979) ("Relate. To stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with or connection with.").

Our basic submission is that the phrase "relating to" in Section 105(a)(1) of the Deregulation Act should be given the same "broad common-sense meaning" as the comparable phrase in ERISA. *Metropolitan Life Ins. Co.* v. *Massachusetts*, 471 U.S. at 739. Nothing in the language of Section 105(a)(1) limits that provision to direct regulatory controls of the type that other provisions of the Deregulation Act withdrew—or to some amorphous category of "utility-type" regulation. That is clear not just from the phrase "relating to," but also from other features of the statutory text.

First, Section 105(a)(1) extends to "any" state law, without referring to any functional subcategory of those laws. Indeed, the preemption provision is not limited to the types of legal provisions that are characteristic of "utility-type" regulation. Typically, regulation of that sort is conducted by individual States pursuant to statutory authority. In Section 105(a)(1), Congress took care to preclude a variety of other forms of state action—including standards adopted by more than one State "having the force and effect of law." Like the phrase "relating to", that part of Section 105(a)(1) parallels the ERISA preemption provision. See *Ingersoll-Rand Co.* v. *McClendon*, 111 S. Ct. at 482-483; 29 U.S.C. 1144(c)(1).

Second, Section 105(b) of the Deregulation Act, 49 U.S.C. App. 1305(b), preserves from preemption the authority of a state "owner or operator of an airport * * * to exercise its propriety powers and rights." The "proprietary powers and rights" of an airport owner—which are limited by federal law and involve such matters as airport noise and congestion—do not include utility-type regulation of the rates, routes, and services

of airlines serving public airports.[13] It is clear, therefore, that Congress must have intended the phrase "relating to rates, routes, or services" to reach beyond the kind of regulatory authority that the Deregulation Act withdrew from the CAB. If Section 105(a)(1) were as narrow as petitioner suggests, there would have been no need for the exemption.[14]

Finally, Section 105(c) of the Act, 49 U.S.C. App. 1305(c), includes an express reference to direct state regulation of rates, routes, and services. That subsection mandates particular treatment for air carriers "operating primarily in intrastate air transportation regulated by a State." Thus, when Congress wished to refer specifically to direct regulation of air transportation by the States, it knew how to do so. All of these features of the statutory language undercut petitioner's contention that Congress intended Section 105(a)(1) to foreclose only direct controls on rates, routes, and services.[15]

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[13] See *City of Burbank* v. *Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973); *British Airways Bd.* v. *Port Authority of New York*, 558 F.2d 75, on reh'g en banc, 564 F.2d 1002 (2d Cir. 1977); *Western Air Lines, Inc.* v. *Port Authority*, 817 F.2d 222 (2d Cir. 1987), cert. denied, 485 U.S. 1006 (1988).

[14] There is a "well-settled rule that all parts of a statute, if possible, are to be given effect." *American Textile Mfrs. Inst., Inc.* v. *Donovan*, 452 U.S. 490, 513 (1981). In keeping with that principle, the Court is very reluctant to adopt an interpretation of general statutory language that would render an express exemption unnecessary. For instance, in *Pennsylvania* v. *Union Gas Co.*, 491 U.S. 1, 9-10 (1989), this Court found that a provision exempting States from certain Superfund liability constituted "an explicit recognition of the potential liability of States under this statute," since "Congress need not exempt States from liability unless they would otherwise be liable." See *Shaw* v. *Delta Airlines, Inc.*, 463 U.S. at 98.

[15] In arguing the contrary view, petitioner places heavy reliance on the legislative history of Section 105(a)(1). *E.g.*, Pet. Br. 16-19. In our view, however, the legislative history is of limited value in the context of this case. Because there had been very little price competition among carriers prior to 1978, it is hardly surprising that regulation of air fare advertising received no mention in the committee reports—or that specific references to state regulation involved direct controls on rates, routes, or services. The fact that prior experience with conflicts between state and federal regulation involved that type of state action does not establish that Congress intended the broad language it employed in the statute to have a more restricted meaning. See *Pension Benefit Guaranty Corp.* v. *LTV Corp.*, 110 S. Ct. 2668, 2677 (1990) ("the language of a statute * * * is not to be regarded as modified by examples set forth in the legislative history").

2. There is no merit to petitioner's contention that Section 1106 of the Federal Aviation Act of 1958, 49 U.S.C. App. 1506, warrants such a limitation on Section 105(a)(1). That provision, which was first enacted in 1938 and received no attention in connection with the enactment of the Deregulation Act, provides that "[n]othing contained in this chapter [49 U.S.C. App. 1301-1557] shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies." In *Nader* v. *Allegheny Airlines, Inc.*, 426 U.S. 290 (1976), this

In fact, the legislative history indicates otherwise. The Senate version of the preemption provision would have foreclosed not only laws "establish[ing] any standard determining routes, schedules, or rates, fares, or charges in tariffs of" an air carrier, but also laws "otherwise promulgat[ing] economic regulations" for air carriers. S. 2493, 95th Cong., 2d Sess., § 17 (1978) (quoted in S. Rep. No. 631, *supra*, at 39). The House's version, which was ultimately enacted, combined both types of state laws into a single category of laws "*relating to* rates, routes, or services," H.R. 12,611, 95th Cong., 2d Sess., § 105(a) (1978) (emphasis added) (quoted in H.R. Rep. No. 1211, *supra*, at 40). That category thus goes well beyond laws "determining" rates, routes, or services. Statements in the committee reports regarding the purpose of Section 105(a)(1) also suggest that it was not limited to direct controls; Congress sought to avoid "a confusing system of dual regulation" and granted "sole responsibility" for regulating interstate carriers to the CAB, S. Rep. No. 631, *supra*, at 98; see H.R. Rep. No. 1211, *supra*, at 15-16.

That same theme was repeated six years later when Congress transferred the CAB's authority over deceptive practices to DOT. The committee report accompanying that legislation reiterated Congress's concern that both federal regulation and state preemption were needed to avoid imposing overlapping and conflicting standards on air carriers. See H.R. Rep. No. 793, 98th Cong., 2d Sess. 4 (1984).

Court held that Section 1106 preserved a common law damages action by a passenger who had been "bumped" from a flight for which he had a reservation. The Court found that there was no "irreconcilable conflict between the statutory scheme and the persistence of common-law remedies." 426 U.S. at 299.

After the enactment of Section 105(a)(1), that is no longer true with respect to efforts by states to enact or enforce laws "relating to rates, routes, or services." Unless Section 105(a)(1) is to be limited to laws without remedies, it must be held to supersede some of the remedies that would otherwise have been preserved by Section 1106. Thus, Section 1106 is properly construed only to preserve those remedies not inconsistent with other provisions of the statute, including Section 105(a)(1)'s express preemption provision. That is the interpretation that this Court has long placed on a comparable savings clause in the Interstate Commerce Act. *Pennsylvania R.R.* v. *Puritan Coal Mining Co.*, 237 U.S. 121, 129-130 (1915).[16]

3. We do not suggest, of course, that all state laws having any theoretical connection with an air carrier's rates, routes, or services are preempted. In determining what state laws "relate to" pension plans within the meaning of ERISA, this Court has referred to "the structure and purpose of the statute," *Ingersoll-Rand Co.* v. *McClendon*, 111 S. Ct. at 482, "the purposes of the preemption provision, and the regulatory focus of ERISA as a whole," *Fort Halifax Packing Co.* v. *Coyne*, 482 U.S. 1, 19

[16] The Court has often construed general savings clauses so as not to undercut the remainder of a statute. See *International Paper Co.* v. *Ouellette*, 479 U.S. 481, 494 (1987) ("we do not believe Congress intended to undermine this carefully drawn statute through a general savings clause"); *Offshore Logistics, Inc.* v. *Tallentire*, 477 U.S. 207, 230 (1986) (giving narrow reading to savings clause to preserve uniformity of maritime law); *Chicago & North Western Transp. Co.* v. *Kalo Brick & Tile Co.*, 450 U.S. 311, 328-329 & n.16 (1981) (noting that preemption clause could narrow previously-enacted savings clause); *Texas & Pacific Ry.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426, 446 (1907) (observing, with respect to a savings clause, that "the act cannot be held to destroy itself").

(1987). In particular, the Court has examined whether a state law "risk[s] subjecting plan administrators to conflicting state regulations," *FMC Corp.* v. *Holliday*, 111 S. Ct. at 408, or to the "prospect of conflict" with federal law, *Fort Halifax Packing Co.* v. *Coyne*, 482 U.S. at 19. There is no reason why Section 105(a)(1) cannot be applied with the same sensitivity to its role in the Deregulation Act. An artificially narrow interpretation is not necessary to preserve state laws prohibiting "gambling, prostitution, or the sale of illegal drugs * * * by an airline," tort actions arising from plane crashes, or the like. Pet. Br. 13; accord Public Citizen Br. 9-11. Unlike state laws regarding air fare advertising, those state laws do not relate to rates, routes, or services in a manner implicating competition or the pro-competitive policies of the Deregulation Act.

B. The *NAAG Guidelines*' Detailed Controls On The Form And Content Of Air Fare Advertising "Relate To" Rates Within The Meaning Of Section 105(a)(1)

As noted, a state law "relates to" rates, routes, or services if it has a "connection with or reference to" those matters. A state law incorporating the *NAAG Guidelines* has the requisite relationship with rates charged by air carriers, and that relationship is one that implicates the pro-competitive objectives of the Deregulation Act. The *Guidelines* refer expressly to rates charged by air carriers; in fact, they are limited to advertising of rates in that one industry.[17] More fundamentally, regulation of air fare advertising has a direct connection with the market mechanism through which rates are set in the deregulated airline industry, as well

[17] In the context of ERISA, this Court has made clear that "state laws which make 'reference to' ERISA plans are laws that 'relate to' those plans" for purposes of that statute. *Mackey* v. *Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 829 (1988). There is no merit, therefore, to petitioner's suggestion that enforcement of the *Guidelines* through state law involves only the application of general consumer protection laws having no particular focus on airlines or their rates, routes, and services.

as with the pro-competitive regulatory policies mandated by the Deregulation Act. Consequently, preemption is entirely consistent with the structure, purpose, and regulatory focus of the Deregulation Act. As the Seventh Circuit recognized, "[p]rice advertising surely 'relates to' price," *Illinois Corporate Travel* v. *American Airlines*, 889 F.2d 751, 754 (1989).

1. *State Controls on the Form and Content of Air Fare Advertising Have a Connection With Price Competition in the Airline Industry*

Advertising is the quintessential means by which competitive sellers of air transportation communicate their prices to potential buyers. This Court has recognized that advertising restrictions "serve[] to increase the [consumers'] difficulty of discovering the lowest cost seller of acceptable ability," which leaves sellers "isolated from competition" and reduces "the incentive to price competitively," *Bates* v. *State Bar*, 433 U.S. 350, 377 (1977). Studies in other fields have confirmed that consumers pay higher prices when advertising is restricted. See Kwoka, *Advertising and the Price and Quality of Optometric Services*, 74 Am. Econ. Rev. 211 (1984); Cady, *An Estimate of the Price Effects of Restrictions on Drug Price Advertising*, 14 Econ. Inquiry 493 (1976). Advertising plays a particularly important role in fostering price competition in the airline industry.

a. The economics of the airline industry tend to produce a complex fare structure. A large share of air carriers' costs are joint and common, not directly attributable to any one service or class of passengers. The marginal cost of providing additional service is often low. Most airlines operate with substantial excess capacity overall but face heavy demand for some flights. Air travel is highly seasonal and cyclical. Airlines have some customers (typically traveling on business) who are relatively price-insensitive but who need to be able to fly at particular times and on short notice; other customers (frequently tourists) are price-sensitive but have less stringent demands in terms of flight schedules and

advance notice. A rational response to these conditions is to set fares for relatively price-insensitive customers that are high enough to recover the airlines' joint and common costs, while at the same time using lower fares (in excess of marginal cost) to attract price-sensitive customers to fill seats that would otherwise be empty. See Transportation Research Board National Research Council, *Winds of Change: Domestic Air Transport Since Deregulation* 93-95 (1991) [hereinafter *Winds of Change*].

The Congress that enacted the Deregulation Act was especially dissatisfied with the CAB's failure to allow airlines to establish rates responsive to those economic considerations. See S. Rep. No. 631, *supra*, at 3, 101-106; H.R. Rep. No. 1211, *supra*, at 9. For most of the period prior to 1978, the CAB generally required air carriers to compute fares on the basis of the length of a flight, recognized only a few classes of service, and discouraged experimentation with lower rates. This element of the regulatory scheme was a "focus" of criticism. S. Rep. No. 631, *supra*, at 3. Congress found that the CAB's approach—"when coupled with restricted entry—seriously inhibits price competition among airlines and, as a result, many CAB formula fares are dramatically higher than they would be under a fundamentally less regulated structure." S. Rep. No. 631, *supra*, at 102-103.

The absence of discount fares attracted particular attention. Congress noted that the CAB's approach "may injure the public by encouraging carriers to provide uniform fare and service offerings other than by discounts even though consumer demand in many markets might result in innovative offerings to meet the needs of those particular markets." S. Rep. No. 631, *supra*, at 102. The Senate Committee Report described low fares available on routes not subject to federal regulation, *id.* at 103-104, and criticized federal regulatory policy that had discouraged similar discounts on interstate routes, *id.* at 104-105. To promote price competition and discounts, the Deregulation Act removed substantive and procedural

barriers to reduced fares. See 49 U.S.C. App. 1482(d)-(e); S. Rep. No. 631, *supra*, at 106-110. These provisions have had their intended effect. Currently, domestic carriers are free to set their own fares without government supervision, and some 90% of all air travelers use discount fares.[18]

Fare structures have also become far more complex. See *Winds of Change* 94. Indeed, airlines now have access to sophisticated computer programs—known as revenue management systems—that allow them to "fine tune" the prices at which they sell seats on every flight. In a recent comprehensive study of the domestic airline industry, DOT found that revenue management systems are "pro-competitive." 1 U.S. Department of Transportation, Secretary's Task Force on Competition in the U.S. Domestic Airline Industry, *Pricing* 188-189 (Feb. 1990).

Restrictions on low-priced fares are a necessary aspect of the industry's complex fare schedules. Part of an airline's motivation for offering a reduced fare is to obtain passengers who are committed to flying at a time when the airline would have difficulty selling a full-fare ticket. It would be impossible to persuade passengers to pay different amounts for seats on the same flight if all tickets were issued without restrictions. Consequently, airlines impose restrictions on the lower-priced tickets that enhance their usefulness to the airlines, but make them less attractive or even unavailable to customers desiring to fly on short notice and with an unrestricted schedule. See *Winds of Change* 94-95.

b. Advertising plays a critical role in a market characterized by discounts and restrictions. If airlines are to employ low fares to compete for potential customers, they must be allowed to communicate the availability of the fares. Indeed, an airline's incentive to offer a discount is no greater than its confidence that the discount will become known in the marketplace. A discount makes economic sense only if it produces enough additional travellers to compensate for the reduction in the price charged to each one.[19] Advertising, in turn, contributes to price competition to the degree—no more and no less—that it is cost-effective and accessible to consumers.

[18] *Economic Report of the President* 203 (1988); Bureau of Economics of the Federal Trade Commission, *The Deregulated Airline Industry: A Review of the Evidence* 1, 6 (Jan. 1988); 1988 FTC Letter, at 1.

The *Guidelines* provisions that led to the filing of this lawsuit have a tendency to impair pro-competitive advertising common in this industry. By way of illustration only, it is a common practice in the industry for so-called "consolidators" to obtain blocks of seats at a substantial discount from airlines whose experience tells them those seats would otherwise remain unsold. The consolidators can (and to survive, must) make the availability of their low fares known to consumers while incurring the smallest possible advertising expense. When they are successful, they serve as an important source of particularly low fares and as a competitive spur to airlines themselves.

To publicize their prices, consolidators often employ "grid" advertisements showing fares to a number of destinations. These advertisements present a great many price and service options to a wide range of destinations in a small (and relatively inexpensive) space.[20] With the information provided in a single advertisement, consumers are able to determine the fare for a round-trip to and from a single destination and, often, to calculate the fares for an "open jaw" trip (a trip in which the traveller takes different routes outward and homeward bound).

[19] 1988 FTC Letter, at 5.

[20] These advertisements are very common. See, *e.g.*, New York Times Travel Section, Feb. 9, 1992, at 23, 26, 28-29, 31. Grid advertisements customarily list ½ round trip fares for as many as 50 foreign destinations. Notes to the fares indicate that varying amounts of taxes, one-way surcharges, restrictions, weekend surcharges, and other terms may apply to particular flights.

Advertisements taking this form cannot be brought into compliance with the *NAAG Guidelines*. First, in order to present information regarding both round trips and open jaw trips in a single advertisement, such advertisements often show the relevant "1/2 Round-Trip Fares" and instruct potential purchasers that an additional sum will be charged for a one-way fare. The *NAAG Guidelines* prohibit use of 1/2 round trip fares, as well as separately itemized surcharges. U.S. Br. App. 26a-27a. Second, although the fees applicable to trips to and from various foreign destinations are relatively small (typically between $10 and $20 each way), the amount of the fees often varies depending on which direction a flight is going. If one-way fares for open jaw travellers must show the total price of each ticket, as the *NAAG Guidelines* require, *id.* at 26a, two prices would be necessary for each overseas destination.[21] Third, although the advertisements disclose that restrictions may apply for particular flights and advise potential customers to call for details, they do not purport to itemize all of the terms and conditions attached to each of the flights referred to in a given advertisement. Under the *NAAG Guidelines*, as many as 10 types of restrictions must be specifically set

[21] As DOT has explained in the preamble to its proposed regulation on this subject, charges that it allows to be unbundled "are limited, or apply only in certain markets or for certain flights, thus making it difficult or impossible to [publish] advertisements with one way and round-trip fares to multiple destinations and include the charges in single advertised rates." 54 Fed. Reg. 31,053 (1989).

The problem is not limited to foreign trips. U.S. airports are now allowed to assess passenger facility charges—a maximum of $3 per airport, up to a total of $12 per trip, to be collected by air carriers. 56 Fed. Reg. 24,254 (1991). Thus, the total price of a ticket may vary by up to $12 depending on the embarkation, disembarkation, and connecting airports used by a traveller. If the additional charges had to be included in the total advertised air fare, as the *NAAG Guidelines* require, a number of fares might have to be listed in an air fare advertisement for just one city-pair market (*e.g.*, Washington to Los Angeles), since the total price might vary depending on whether various alternative flights are direct and, if not, which airports are used for connecting flights.

forth in any print advertisement for a given fare. *Id.* at 18a-19a.[22] It is impossible to fit those disclosures into the small, economical advertisements favored by consolidators.

This example is only illustrative. By forcing sellers of air transportation to present fares and restrictions in a particular form with a specified level of detail, the *NAAG Guidelines* restrain the sellers' ability to communicate with the public. In some situations, such as advertisements by consolidators or short radio spots, the restrictions may make advertising altogether impracticable. In others, the *Guidelines* may inhibit the cost-effective presentation of information contributing to price competition in the airline industry. Either way, the *Guidelines* have an effect on—and thus a connection with—price competition that the Deregulation Act was designed to foster.

[22] Under Section 2.1 of the *NAAG Guidelines*, "[p]rint advertisements for fares must make clear and conspicuous disclosure of restrictions such as" (U.S. App. Br. 18a-19a):

- Limited-time availability.
- Limitations on right to refund or exchange of ticket.
- Time of day or day of week restrictions.
- Length of stay requirements.
- Round trip purchase requirements.
- Variations in fares to or from two or more airports serving the same metropolitan area.
- Limitations on, or extra charges for, breaks or changes in itinerary, such as failure to travel on every leg as scheduled.
- The statement, if any, required by Guideline 2.4
- Any other material restriction on the fare.

Those restrictions must be itemized, furthermore (U.S. Br. App. 19a):

- in the body copy of the advertisement,
- adjacent to the fare price, or
- in a box with a heading such as "Restrictions."

2. *State Controls on the Form and Content of Air Fare Advertising Interfere with the Regulatory Regime that Congress Created to Assure Due Consideration of Consumer Protection and Competition in the Airline Industry*

It is true, of course, that advertising can be misleading and deceptive. But it does not follow, as petitioner asserts (Pet. Br. 11-13) and the *NAAG Guidelines* assume,[23] that full disclosure of the details of all restrictions on air fares invariably promotes competition or benefits consumers. An advertisement that contains a bewildering amount of detail has the potential to confuse, as well as to educate. Moreover, disclosure requirements that increase the cost of advertising can reduce the information available to consumers. As the FTC explained, in opposing the *NAAG Guidelines*:

> Advertising is seldom an appropriate vehicle for disclosing all material characteristics of a product or service. Consumers do not rely on advertising of this type to make a final purchase decision, and it does not serve that function. The goal of most advertising for discount airfares is to signal that bargain prices are available and suggest that consumers inquire further when they contact a travel agent or airline to make specific travel plans. Requiring too much information in ads can have the paradoxical effect of stifling the information that consumers receive.

1987 FTC Letter, at 4. Accord 1988 FTC Letter, at 5-6. In short, an undue emphasis on disclosure may actually undercut competition and thereby disadvantage the consumer.

a. The Deregulation Act included a new declaration of policy requiring federal authorities to address issues of this type with a view both to the interests of consumers and to the statutory objective of enhancing competition. When DOT exercises its authority to take action against deceptive practices, 49 U.S.C. App. 1381(a), the Deregulation Act requires it to give specific consideration to, among other things (49 U.S.C. App. 1302(a)(3), (4), (7), and (9)):

> (3) The availability of a variety of adequate, economic, efficient, and low-price services by air carriers and foreign air carriers without * * * unfair or deceptive practices * * *.
>
> (4) The placement of maximum reliance on competitive market forces and on actual and potential competition (A) to provide the needed air transportation system, and (B) encourage efficient and well-managed carriers to earn adequate profits and to attract capital.
>
> (7) The prevention of unfair, deceptive, predatory, or anticompetitive practices in air transportation * * *.
>
> (9) The encouragement, development, and maintenance of an air transportation system relying on actual and potential competition to provide efficiency, innovation, and low prices, and to determine the variety, quality, and price of air transportation services.

Those provisions gave the federal government "a clear and firm mandate to regulate in a manner which places primary reliance on competition." S. Rep. No. 631, *supra*, at 52. Indeed, "the policy statement designates a competitive industry as a goal in itself." *Ibid.* Accord H.R. Rep. No. 1211, *supra*, at 5-6. "This new charter [was] intended as a legislative mandate * * * both as to the direction and policy of aviation regulation and also * * * the limits of such policy." H.R. Conf. Rep. No. 1779, 95th Cong., 2d Sess. 56 (1978). In our view, Section 105(a)(1) was designed to preclude not only state laws reimposing the direct controls on rates, routes, and services that Congress abolished, but also laws relating to those matters that could interfere with the pro-competitive policies that federal authorities were directed by Congress to implement.

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[23] "The essence of the [*NAAG Guidelines*] is that consumers must be advised of the limits which the airlines [*sic*] has chosen to impose on consumers' ability to buy tickets at the advertised price." U.S. Br. App. 21a.

b. Shortly after the enactment of the Deregulation Act, the CAB promulgated a regulation embodying this view of Section 105(a)(1). 14 C.F.R. 399.110. In the main, the regulation tracks the statutory language, but it also provides a non-exhaustive list of examples of regulatory actions that would be deemed preempted.[24] In the explanatory note accompanying the regulation, the Board explained that "it, not the States, is responsible for economic regulation[] of all the routes, rates, or services of any airline" operating under federal authority and that it was "occupying the entire field of economic regulations." 44 Fed. Reg. 9948 (1979). That degree of preemption, the Board continued, was consistent with Section 105's policies of "prevent[ing] State economic regulation from frustrating the benefits of decreased Federal regulation" and "avoid[ing] the confusion caused under existing law which permitted dual State and Federal regulation of the safe carrier." *Id.* at 9949.[25]

Significantly, the Board also made clear its view that preemption was not limited to direct regulation of rates, routes, and services themselves, but also extended to matters as to which the Board would be called upon to balance the concerns of consumers with the Deregulation Act's policy of fostering competition. In explaining why preemption should extend to capital structure, minimum insurance requirements, bonding, and other similar matters, the CAB stated (44 Fed. Reg. 9951 (1979)):

> Such regulations necessarily involve a balancing of such considerations as the need to assure carriers' financial integrity and further other goals of consumer protection, and at the same time, to reduce the barriers to entry and encouraging competition. Such balancing is essential to the success of deregulation and reliance on the free market, and it is specifically within the Board's province.

This understanding of Section 105(a)(1)'s function is entitled to deference. *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 131 (1985); *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-845 (1984).[26]

c. DOT's approach to air fare advertising has embodied just this sort of balancing. In keeping with the regulatory criteria established by Congress in 49 U.S.C. App. 1302(a), DOT has fashioned its enforcement policy with the dual objectives of protecting consumers and avoiding undue interference with price competition. For instance, it has long been DOT's policy to permit "the exclusion of foreign departure taxes (if collected by the advertiser), customs fees, immigration fees, security fees, agricultural inspection fees, tourist and fuel surcharges and any other surcharges that may be imposed by the U.S. Federal, State or local governments or foreign governments, from the total advertised price, provided all advertisements clearly identify and state the amount of the charges elsewhere in the ad, as a total or separately." [27]

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[24] The regulation states (14 C.F.R. 399.110(d)):

> Examples of regulatory actions preempted under this section include, but are not limited to, tariff filing, certification, regulations governing flight frequency, mode of operation, in-flight amenities, liability insurance, bonding, and capitalization.

[25] The reference to "economic" regulation is not fairly limited to direct controls on routes, rates, or services. At the time this regulation was issued, as now, the anti-deception provision of the Federal Aviation Act, 49 U.S.C. App. 1381, was included in Subchapter IV of the Act, entitled "Air Carrier Economic Regulation."

[26] Petitioner contends that this understanding of the scope of Section 105(a)(1) does not reach state controls on the form and content of air fare advertising. In his view, those controls "do not advance consumer protection at the expense of market competition," but rather "protect consumers by protecting the competitive functioning of the marketplace." Pet. Br. 23. As this case reflects, however, the risk that state laws may undercut pro-competitive federal policy exists even when States conceive of their regulation as advancing competition or protecting consumers. State and federal authorities seeking to advance competition may disagree on how that goal is best served. The result may be overlapping and conflicting standards plainly inconsistent with the statutory preference for a uniform, pro-competitive regulatory policy. See 54 Fed. Reg. 31,054 (1989).

[27] J.A. 43a. DOT first issued an order allowing separate presentation of international departure taxes. J.A. 33a-39a. It then issued

In adopting its policy, DOT was attempting "to allow the industry to advertise its services in a variety of ways and * * * to encourage open price competition," while at the same time "ensur[ing] that the traveling public is informed of the total amount of charges they must pay to take advantage of services offered." J.A. 43a. See J.A. 48a (noting that this policy "[b]alanc[ed] the industry's need to advertise innovatively and competitively against the traveling public's need for accurate price information"). DOT found that a requirement that all charges be combined in an advertisement could interfere with certain types of advertising and lead to confusion. J.A. 42a. The agency also noted that it had received "few complaints from consumers indicating that they have been deceived by advertisements or promotional materials that in fact identify special services and display the additional charges separately in legible type." J.A. 44a.[28]

d. The *NAAG Guidelines* embody diametrically different conclusions regarding the same type of advertising. States committed to those standards regard advertisements that comply with DOT's policy as offers of "fictitious ticket prices which represent only a portion of the actual airfare one must pay to purchase the advertised

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orders extending the policy to the other items listed in text, J.A. 40a-45a, and clarifying its scope, J.A. 46a-52a. After those orders were struck down because they had been issued without notice and opportunity for comment, *Alaska* v. *Department of Transportation*, 868 F.2d 441 (D.C. Cir. 1989), the Department restated its enforcement policy in consent decrees, see, *e.g.*, Order 89-4-25, at 2 n.1 (Apr. 11, 1989). It also issued a proposed rule codifying that policy. 54 Fed. Reg. 31,052 (1989).

[28] Throughout the period material to this dispute, a very small percentage of the complaints received by the DOT's Office of Consumer Affairs has concerned advertising. U.S. Department of Transportation, Office of Consumer Affairs, *Air Travel Consumer Report* (Jan. 1988) (Complaint Categories) (in 1987, of 44,845 complaints, 411 concerned advertising); U.S. Department of Transportation, Office of Consumer Affairs, *Air Travel Consumer Report* (Feb. 1992) (Complaint Categories) (in 1991, of 7551 complaints, 104 concerned advertising).

ticket" and as "an obvious attempt to deceive or mislead consumers into believing that an advertised airfare is less expensive than it really is." 31 States Br. 6-7.

We believe that Section 105(a)(1) is fairly construed to protect the pro-competitive regulatory judgments mandated by the Deregulation Act's statement of policy from this type of conflict. When it set out to restore competition to the airline industry, Congress both removed direct federal controls on rates, routes, and services and directed that remaining federal authority relating to those matters be exercised so as to advance competition. It would make little sense to construe Section 105(a)(1) to protect only a portion of the pro-competitive regime Congress put in place.

This Court has recognized that ERISA's preemption provision was designed "to minimize the administrative and financial burden of complying with conflicting directives among States or between States and the Federal Government." *Ingersoll-Rand Co.* v. *McClendon*, 111 S. Ct. at 484. The same approach is appropriate in the context of Section 105(a)(1). "In reducing federal economic regulation of the field to allow the forces of free competition to rule the marketplace, Congress obviously did not intend to leave a vacuum to be filled by the Balkanizing forces of state and local regulation." *New England Legal Found.* v. *Massachusetts Port Auth.*, 883 F.2d 157, 173 (1st Cir. 1989).

* * * * *

The plain language of Section 105(a)(1) preempts state laws "relating to rates." In the economic and regulatory setting established by the Deregulation Act, the *NAAG Guidelines* that petitioner has threatened to enforce through Texas law fall within that category. In a competitive market, controls on the content and form of air fare advertising relate directly to the fares themselves. Those controls also infringe on the area for which Congress prescribed pro-competitive regulatory criteria. Section 105(a)(1) is properly construed to preserve room for the implementation of those criteria, as well as to

preclude direct state regulation of rates, routes, and services.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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* The Solicitor General is disqualified in this case.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1992 312324 45315

(8)

No. 90-1604

Supreme Court, U.S.
FILED
JAN 13 1992
OFFICE OF THE CLERK

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OCTOBER TERM, 1991

DAN MORALES, Attorney General of Texas,

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v.

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Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF PUBLIC CITIZEN AND AVIATION CONSUMER ACTION PROJECT AS AMICI CURIAE SUPPORTING PETITIONER

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13 January 1992

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ARGUMENT 7

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BRIEF OF PUBLIC CITIZEN AND AVIATION CONSUMER ACTION PROJECT AS AMICI CURIAE SUPPORTING PETITIONER

INTEREST OF AMICI CURIAE

Public Citizen is a consumer organization with over 100,000 members nationwide, and Aviation Consumer Action Project is the only non-profit consumer group working full-time on aviation issues. Both groups advocated passage of the Airline Deregulation Act of 1978, the statute at issue here, and over the past 20 years, both groups have frequently testified before Congress and appeared before federal agencies on issues of concern to the flying public, including airline advertising practices. They have also taken part in other litigation raising the question presented in this case, as well as cases which involve preemption claims and other

passenger rights, including *West v. Northwest Airlines*, 923 F.2d 657 (9th Cir. 1991), *pet. for cert. pending*, No. 91-505. The parties have consented to the filing of this brief.

STATEMENT OF THE CASE

A. *The Proceedings Below.*

In November 1988 the Attorney General of Texas wrote to several of the airline respondents, stating that certain of their advertisements violated Texas laws proscribing false advertising and deceptive practices. The focus of his concern was advertisements which touted a particular fare in large type, while relegating to the fine print the $23 in surcharges which a passenger must pay on top of the advertised price. The airlines responded by seeking and obtaining pre-enforcement injunctive relief from the United States District Court for the Western District of Texas on the ground that Texas law was preempted by federal law. That injunction was later expanded to cover 33 other attorneys general who had expressed an intent to enforce their own deceptive practices laws according to certain prosecutorial guidelines regarding airline advertisements which had been adopted by the National Association of Attorneys General in 1987.

The United States Court of Appeals for the Fifth Circuit affirmed the district court's grant of both preliminary and permanent injunctive relief against the Attorney General of Texas and the other attorneys general. The Fifth Circuit concluded that state law was expressly preempted by section 105 of the Federal Aviation Act, 49 U.S.C. App. § 1305, which preempts state laws "relating to rates, routes, or services" of airlines. The court of appeals read this "relating to" language as broadly preempting any state law which "has a connection with or reference to" airline rates, routes or services (Pet. App. 33a).

Before explaining in the Argument why there is no preemption here, we set forth the regulatory scheme governing the airline industry and describe the specific actions which federal agencies have taken in the area of airline advertising.

B. *The Statutory Framework.*

Economic regulation of the airline industry began with enactment of the Civil Aeronautics Act of 1938, ch. 601, 52 Stat. 973. That act created the Civil Aeronautics Authority, which was charged with regulating airline routes and rates; it was renamed the Civil Aeronautics Board ("CAB") two years later. *See* Reorg. Plan No. IV of 1940, § 7, 54 Stat. 1235. Commercial aviation was still a fledgling industry in 1938 and was threatened by the heavy price cutting that marked the Depression-era economy. Congress thus decided to nurture this industry by adopting a public utility style of regulation similar to that imposed on other transportation industries. In a nutshell, airlines could not charge a fare unless it had been filed and cleared by the CAB, nor could a company enter the airline industry or start a new route unless it could show to the Board that new service was "required by the public convenience and necessity," a demanding standard which placed the burden of proof on the new entrant, who had to show that the new service would not hurt incumbent airlines. *See* S. Rep. No. 95-631, 95th Cong., 2d Sess. 1-5 (1978)("Senate Report"); H.R. Rep. No. 95-1211, 95th Cong., 2d Sess. 1-6 (1978)("House Report").[1]

This form of regulation remained in effect for the next 40 years. In 1958 Congress superseded the 1938 act with the Federal Aviation Act (the "Act"), Pub L. No. 85-726, 72 Stat. 731, 49 U.S.C. App. § 1301 *et seq*. The 1958 Act created what is now the

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[1] The history of domestic aviation and CAB regulation has been chronicled in many places, both before and after the Airline Deregulation Act of 1978. A 1975 Senate Subcommittee report, which was influential in the deregulation debate, made a detailed critique of CAB's regulation and outlined the need for reform. *Civil Aeronautics Board Practices and Procedures: Report of the Subcomm. on Administrative Practice and Procedure of the Sen. Comm. on the Judiciary*, 94th Cong., 1st Sess. (1975). The chief counsel of that subcommittee later wrote a useful analysis of the shortcomings of CAB regulation and how the Deregulation Act addressed them. *See* S. Breyer, *Regulation and its Reform* 197-221 (1982). More recent commentaries which detail the industry's evolution until 1978, what the Deregulation Act sought to accomplish, and what has happened since then include a recent report by the Transportation Research Board, a unit of the National Academy of Sciences, entitled *Winds of Change: Domestic Air Transport Since Deregulation* (1991), and Levine, "Airline Competition in Deregulated Markets: Theory, Firm Strategy, and Public Policy," 4 *Yale J. Reg.* 393 (1987).

Federal Aviation Administration and focused primarily on safety issues, but it also reenacted without substantive change the 1938 statute under which the CAB regulated airline economics and operations. *See* H. Rep. No. 2360, 85th Cong., 2d Sess. 1 (1958).

Twenty years later, Congress decided that the CAB's economic regulation of the industry had outlived its usefulness and enacted the Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 (the "Deregulation Act"). This law amended the Federal Aviation Act to replace public utility-style regulation with a market-oriented approach which gave airlines freedom to set their fares and to enter or exit particular markets. *See generally* Senate Report at 1-5, House Report at 1-5 and note 1, *supra*. The Deregulation Act also contained a "sunset" provision which phased out the CAB's regulatory functions and required the agency to close its doors by the end of 1984, with certain residual functions (such as regulating international routes and rates, approving airline mergers and administering a subsidy program for small community service) assigned to other agencies, principally the Department of Transportation ("DOT"). 49 U.S.C. App. § 1551. Of relevance here, the 1978 Act added a new section 105 to the Act, 49 U.S.C. App. § 1305, which sought to preempt state laws "relating to rates, routes, or services." In doing so, however, it retained intact section 1106 of the Act, a saving clause which had been on the books since 1938 and which expressly preserved "the remedies now existing at common law or by statute." 49 U.S.C. App. § 1506. The interaction of these two statutes is the core issue in this case.

Apparently by oversight, the Deregulation Act made no provision for transferring the CAB's power to police anti-competitive, unfair or deceptive practices, which the Board had authority to regulate under section 411 of the Act, 49 U.S.C. App. § 1381. Fearing that existing consumer protection rules would disappear when the CAB closed in 1984 and that the federal government would be powerless to move against anti-competitive or deceptive practices, Congress passed the Civil Aeronautics Board Sunset Act of 1984, Pub. L. No. 98-443, 98 Stat. 1703. This statute gave DOT the Board's authority under section 411 and preserved existing CAB rules on such matters as overbooking, lost luggage, false advertising and charter tours.

C. *Federal Regulation of Airline Advertising.*

Section 411 of the Act empowers DOT to investigate "whether any air carrier, foreign air carrier, or ticket agent has been or is engaged in unfair or deceptive practices or unfair methods of competition in air transportation or the sale thereof." If DOT makes such a finding, it shall "order such air carrier, foreign air carrier, or ticket agent to cease and desist from such practices or methods of competition." 49 U.S.C. App. § 1381. That provision, first included in the 1938 Act and carried forward intact through subsequent rewrites, is based on section 5 of the Federal Trade Commission Act, which charges the FTC with regulating unfair and deceptive practices in other industries. *See Pan American World Airways, Inc. v. United States*, 371 U.S. 296, 303 (1963).[2]

Acting pursuant to section 411, the CAB and DOT have adopted policy statements which identify certain practices as violating that statute. *See* 14 C.F.R. Part 399 (1991). Of relevance here is 14 C.F.R. § 399.84, which declares it unlawful to advertise the price of air transportation, a tour or tour component (such as a hotel stay) "unless the price stated is the entire price to be paid by the customer to the air carrier, or agent for such air transportation, tour, or tour component." Airlines which violate this provision are subject to prosecution under section 411 of the Act, which can lead to imposition of a fine and a cease-and-desist order. When the Board first adopted section 399.84 in 1975, it applied only to tour operators, although the rule was amended in 1984 to cover all air carriers as well. *See Alaska v. Department of Transportation*, 868 F.2d 441, 442 (D.C. Cir. 1989)("*Alaska v. DOT*").

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[2] Section 5 of the FTC Act proscribes "[u]nfair methods of competition in commerce and unfair or deceptive acts or practices in commerce." 15 U.S.C. § 45(a)(1). The CAB was intended to be the only federal body able to regulate airline advertising because section 1107(f) of the 1938 Act, 52 Stat. 1028, now codified at 15 U.S.C. § 45(a)(2), amended section 5 of the FTC Act to bar the FTC from regulating airlines. That prohibition remains in effect today, leaving DOT as the sole federal agency able to regulate deceptive practices in the airline industry. The only change which Congress made to section 411 over the years was the addition of a new subsection (b) in 1984, which allows airlines to incorporate by reference in a ticket the full terms of the contract of carriage.

Even though this rule had been issued through notice-and-comment rulemaking proceedings, DOT decided in 1985 to bypass those procedures and to issue an order allowing airlines to exclude the $3 international departure tax from the advertised price and to disclose it only in the fine print. DOT Order 85-12-68 (24 December 1985). Various airlines went beyond this exemption, however, and began to relegate other charges to the fine print. Rather than take action against these violations, however, DOT rushed to embrace them.

In 1988 DOT issued two further orders pursuant to section 411, again bypassing the public rulemaking process. Order 88-3-25, issued 10 March 1988, allowed airlines to list separately "state foreign departure taxes, security charges, custom fees, immigration fees, security fees, agriculture inspection fees, tourism and fuel surcharges, as well as any other surcharges (when these items are collected by offeror) that may be imposed by the U.S. Federal, State or local governments or foreign governments," provided that the advertisements "conspicuously state elsewhere in the advertisement the amount of such charges and the services such charges cover and indicate that such charges must be paid by the customer in addition to the advertised price." Order 88-8-2, issued on 2 August 1988, clarified that airlines could unbundle only those charges which are levied on a per-passenger basis and not such items as fuel taxes which are levied directly on the airline.

Twenty-seven states sued DOT over these two orders, alleging that they were invalid because they were issued without public participation, as required by the Administrative Procedure Act. In January 1989, about the same time that this litigation was initiated, the District of Columbia Circuit agreed and invalidated the two 1988 orders in *Alaska v. DOT*, *supra*. In July 1989 DOT issued a Notice of Proposed Rulemaking ("NPRM") proposing to incorporate the 1988 orders into its advertising regulation. 54 Fed. Reg. 31052 (26 July 1989). The comment period has long since closed, but no final rule has yet been issued. In a 1989 consent order, however, entered before this NPRM was issued, DOT stated that it will not bring suit against airlines which unbundle surcharges in the manner proposed by the NPRM, even though such unbundling is barred by current DOT rules. DOT Order 89-4-25 at 2 n.1 (11 April 1989).

SUMMARY OF ARGUMENT

Texas' efforts to regulate airline advertising practices are not expressly preempted by section 105(a)(1) of the Federal Aviation Act. Congress adopted this provision as part of the Airline Deregulation Act, which ended federal controls over airline fares and routes. Having decided to replace this public utility-style of regulation with marketplace competition, Congress also decided that it would make no sense to leave room for similar regulation at the state or local level by allowing the states to impose their own views as to what was a reasonable fare or how many airlines should serve a particular route.

Section 105 was thus intended to foreclose those types of regulatory activities, but there is no evidence, either in the text of the statute or its history, that Congress intended to eliminate state consumer protection laws or other statues which the states were free to enforce prior to the Deregulation Act and which have continued vitality under the saving clause in section 1106 of the Act, which the Deregulation Act did not alter in any way.

In Part A, we demonstrate first why the Fifth Circuit erred in giving section 105 a broad reading which produces absurd results which Congress could not have intended and why section 1106 preserves the Texas statute at issue here. Part B examines the text and legislative history of the Deregulation Act and explains what Congress did intend to preempt, *i.e.*, those laws which affect licensing or operational decisions, and not state laws which have co-existed with federal law since 1938. Having shown that no congressional action can form the basis for a finding of preemption, either express or implied, Part C explains why Texas' deceptive practices law is not preempted by various actions taken by federal regulators dealing with airline advertising.

ARGUMENT

THE FEDERAL AVIATION ACT DOES NOT PREEMPT CONSUMER PROTECTION LAWS AND OTHER STATE LAW REMEDIES.

Preemption issues are ultimately resolved by determining

the intent of Congress, *Ingersoll-Rand Co. v. McClendon*, 111 S. Ct. 478, 482 (1990); *Wardair Canada, Inc. v. Florida Dep't of Revenue*, 477 U.S. 1, 6 (1986); *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 747 (1985), and state law may be preempted in at least three ways. First, Congress may preempt state law expressly if such a "command is explicitly stated in the statute's language." *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977). Second, preemption may be implied if federal law is "sufficiently comprehensive to make reasonable the inference that Congress 'left no room' for supplementary state regulation." *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 713 (1985), *quoting Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Third, state law may be preempted to the extent it "actually conflicts with a valid federal statute," *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 158 (1978), *i.e.*, if compliance with both regimes "is a physical impossibility," *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963), or if state law is "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67-68 (1941). *See also Wisconsin Public Intervenor v. Mortier*, 111 S. Ct. 2476, 2481-82 (1991).

The court of appeals decided this case on express preemption grounds, but this brief will show why state efforts to regulate the airline advertising in question here are not preempted under any of those theories.

A. *The "Relating To" Language in Section 105 Should Be Read Much More Narrowly Than The Fifth Circuit Did.*

The Fifth Circuit concluded that Congress expressly preempted state regulation of airline advertising in 1978 when it enacted section 105(a)(1) of the Federal Aviation Act, which states:

> [N]o State or political subdivision thereof and no interstate agency or other political agency of two or more States shall enact or enforce any law, rule, regulation, standard or other provision having the force and effect of law relating to rates, routes, or services of any air carrier having authority under Title IV of this chapter to provide air transportation.

49 U.S.C. App. § 1305(a)(1). The court of appeals read the "relating to [an airline's] rates, routes, or services" language as having the same broad meaning as similar "relating to" language in the preemption provision of the Employment Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1144(a), *i.e.*, as preempting state laws which have "'a connection with or reference to'" an airline's rates, routes or services. Pet. App. at 33a, quoting *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 97 (1983)(emphasis added). This was error for several reasons.

First, the problems which the 93rd Congress sought to address in the pension area are not the same problems which the 95th Congress intended to address in the aviation field. *Shaw* examined the text and history of ERISA and found that Congress valued uniformity in the pension field to such an extent that it clearly wanted to extinguish state law and make federal law the sole source of a beneficiary's rights. *Id.* at 98-100. In this case, by contrast, we have a statute which preempts *and* generally preserves state laws, thus making ERISA's broad preemption language a poor guide for determining congressional intent. And, as a more general proposition, this Court's insistence in preemption cases that one must divine congressional intent and identify the specific problems that Congress wanted to solve makes it unlikely that comparing the text of one statute with the text of another statute from a wholly unrelated field will provide much assistance.

Second, the Fifth Circuit's reliance on *Shaw* overlooks this Court's caveat in that case that "relating to" should not be given a broad reading if there is "good reason to believe Congress intended the language to have some more restrictive meaning." *Id.* at 97. Indeed, this Court noted in a case decided the same day as *Shaw* that the ERISA preemption clause is "virtually unique." *Franchise Tax Board v. Construction Laborers Vacation Trust*, 462 U.S. 1, 24 n.26 (1983). *Accord, Environmental Encapsulating Corp. v. City of New York*, 855 F.2d 48, 56 (2d Cir. 1988)(broad reading of ERISA's "relating to" language should be "confined to the ERISA regulatory scheme").

Third, giving section 105 a broad preemptive reach would produce absurd results which Congress could not possibly have intended. *Cf. English v. General Electric Co.*, 110 S. Ct. 2270, 2277 (1990). Suppose, for example, that a ticket agent deliberately and fraudulently overcharged a passenger. Or that a flight attendant

dumped a pot of hot coffee on a passenger's lap, causing serious physical injury. Or that an airline breached an explicit term of its contract with the passenger. Or that an airline operated an aircraft in a negligent fashion such that it crashed, killing all on board. In each case, state statutes or common law theories provide remedies for aggrieved passengers, yet under the approach taken by the Fifth Circuit, these remedies are preempted because they have a "connection with or reference to" an airline's "rates, routes, or services."

We are aware of no court which has held that these claims -- and all tort, contract or other claims arising under state law which somehow "relate" to airline rates, routes or services -- are preempted by section 105. Indeed, the Fifth Circuit's reasoning contains no limiting principle to help identify which state laws are not preempted because they lack a "connection with or reference to" airline rates, routes or services. As one court noted in rejecting a preemption claim in another advertising case, a broad reading of section 105 could "bar a building code provision that increased the cost of [an airline's] hanger facilities because that regulation added to its costs and -- ultimately -- the rate it charged its customers." *People of the State of New York ex rel. Abrams v. Trans World Airlines, Inc.*, 728 F. Supp. 162, 176 (S.D.N.Y. 1989).[3]

The Fifth Circuit did acknowledge the enduring presence of

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[3] Although various airlines have argued that section 105 preempts state tort law in accident cases, that view has been uniformly rejected by the lower courts. *See In re Air Crash Disaster at Stapleton Int'l Airport, Denver, Colorado, on November 15, 1987*, 721 F. Supp. 1185, 1187 (D. Colo. 1988); *Elsworth v. Beech Aircraft Corp.*, 37 Cal. 3d 540, 208 Cal. Rptr. 874, 879, 691 P.2d 630, 634-35 (1984); *see also People v. Valenti*, 153 Cal. App. 3d Supp. 35, 200 Cal. Rptr. 862, 865 (1984)(criminal statute barring reckless operation of aircraft not preempted); *cf. In re Mexico City Air Crash of October 31, 1979*, 708 F.2d 400 (9th. Cir. 1983).

These cases illustrate another problem with a broad reading of the "relating to" language, namely, it would sweep off the board not only state enforcement actions, but also private tort actions seeking damages against an airline. DOT's power under section 411 extends only to issuing cease-and-desist orders, and the Deregulation Act did not create a federal remedy for passengers who have been defrauded, overcharged, bumped or subjected to other tortious practices. Nor, of course, is there a federal tort remedy to compensate victims of aircraft crashes and their families. Thus, under this reading, no damages remedy would be available in airplane accident cases.

the saving clause appearing as section 1106 of the Act, 49 U.S.C. App. § 1506, which has been on the books since 1938 and which states: "Nothing in this chapter [*i.e.*, the Act] shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies." The court found that section 1106 has no relevance because it "does not preserve state law remedies when there is express preemption" under section 105 (Pet. App. 33a). The court did not explain, however, how one was to determine which state laws Congress wanted to preempt under section 105 and which state laws it wanted to preserve under section 1106. If the Fifth Circuit's "connection with or reference to" reading of section 105 is correct, then section 1106 would be all but extinct. As we now explain, section 1106 has greater vitality than the Fifth Circuit acknowledged.

In 1976 this Court rejected a variation of the current preemption argument when it held that section 1106 preserves state law actions, even when there is a federal rule which addresses the issue in question. *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290 (1976). That case has considerable relevance here. The plaintiff in *Nader* was bumped from an oversold flight. Rather than accept the liquidated damages offered under a federal regulation, he elected to sue the airline, alleging the common law tort of fraudulent misrepresentation. The district court ruled in his favor, but the court of appeals reversed, holding that the doctrine of primary jurisdiction barred him from pursuing his suit until the CAB had completed an investigation of overbooking practices. *Id.* at 292-96.

This Court unanimously reversed, holding that section 1106 allows a passenger to pursue statutory and common law damage claims regardless of what may (or may not) be happening at the CAB. The Court found no "irreconcilable conflict between the statutory scheme and the persistence of common-law remedies." *Id.* at 299. It noted that section 411 empowers the CAB to investigate and issue a cease and desist order, a remedy which does not "represent the only, or best, response to all challenged carrier actions that result in private wrongs." *Id.* at 303. The Court concluded that state common law remedies may comfortably coexist with the federal government's authority under section 411, adding that the CAB had taken that view for a number of years.

Id. at 307 & n.18.[4]

In our view, section 1106, as construed by *Nader*, remains good law and provides the statutory foundation preserving state actions such as the ones at issue here. Section 1106 was not repealed when Congress passed the Deregulation Act in 1978, a curious omission if Congress really intended to preempt state laws having any "connection with or reference to" airline routes, rates or services. Nor did Congress repeal this section when it enacted the CAB Sunset Act in 1984. Thus, in order to accept the Fifth Circuit's broad reading of section 105's "relating to" language, it is necessary to conclude that section 105 implicitly repealed section 1106 by dint of its subsequent enactment. That claim is untenable and clashes with several canons of statutory construction which apply here.

In *Watt v. Alaska*, 451 U.S. 259 (1981), this Court construed "two statutes, each of which by its literal terms applies to the facts before us." *Id.* at 266. The Court declined simply to give priority to the statute which was passed later in time, noting its obligation to "ascertain the actual intent of Congress." *Id.* The Court explained, in language relevant here, how a reviewing court is to conduct that task:

> Our examination of the legislative history is guided by another maxim: "'repeals by implication are not favored,'" *Morton v. Mancari*, 417 U.S. [535] at 549 [(1974)], *quoting Posadas v. National City Bank*, 296 U.S. 497, 503 (1936). "The intention of the legislature to repeal must be 'clear and manifest.'" *United States v. Borden Co.*, 308 U.S. 188, 198 (1939), *quoting Red Rock v. Henry*, 106 U.S. 596, 602 (1883). We must read the statutes to give effect to each if we can do so while preserving their sense and purpose. *Mancari*, *supra*, at 551;

[4] At the time of the *Nader* suit, the CAB rules (14 C.F.R. Part 250) allowed a bumped passenger to receive damages equal to the face value of the ticket, within a range of $25 and $200. 426 U.S. at 294-95. Later revisions to Part 250 retained that same basic approach, and at no point after *Nader* did the Board ever claim that Part 250 provides the exclusive remedy for overbooking and that alternative state law remedies are preempted. *See* 47 Fed. Reg. 52980 (24 November 1982); 43 Fed. Reg. 24277 (5 June 1978).

> *see Haggar Co. v. Helvering*, 308 U.S. 389, 394 (1940).

Id. at 266-67. *See also United States v. Fausto*, 484 U.S. 439, 453 (1988); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1017 (1984).

Two other rules of statutory construction guide the inquiry. First, the burden is on the party arguing that a legislative act has changed existing law. *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 521 (1989). Second, there is a "presumption against finding pre-emption of state law in areas traditionally regulated by the States," such as regulation designed to protect consumers from unfair or deceptive practices, and thus Congress's intent to preempt this authority must be "'clear and manifest.'" *California v. ARC America Corp.*, 490 U.S. 93, 101 (1989), *quoting Rice v. Santa Fe Elevator Corp.*, *supra*, 331 U.S. at 230. *See also Gregory v. Ashcroft*, 111 S. Ct. 2395 (1991); *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984); *Florida Lime & Avocado Growers, Inc. v. Paul*, *supra*, 373 U.S. at 146.

Application of these principles to the present case compels a conclusion that section 1106 remains viable today. The legislative history of the Deregulation Act, which we discuss in more detail below, demonstrates no intent whatsoever to repeal section 1106 or to eliminate state law remedies.[5] Virtually every provision of the existing Act dealing with economic regulation was affected in some way or another by this law. During that debate, there was no call by industry representatives to repeal section 1106 or to overturn *Nader*, which was decided just as the legislative debate was starting. Indeed, one can search the more than 7000 pages of hearing transcripts, the committee reports, and the floor debates and find not a single mention of this issue, much less a "clear and manifest" indication to preempt state consumer protection laws. *English v. General Electric Co.*, *supra*, 110 S. Ct. at 2275.

The analysis we advance here -- which seeks to harmonize the savings clause with an express preemption provision -- finds

[5] The legislative history of this Act, save for the hearing transcripts, has been compiled by the House Committee on Public Works and Transportation into one volume entitled *Legislative History of the Airline Deregulation Act of 1978*, 96th Cong., 1st Sess. (May 1979)(Serial No. 96-5).

ample support in the case law. Indeed, this Court has taken care to give effect to savings clauses similar to section 1106 even when giving a broad preemptive effect to other provisions of the statute. *International Paper Co. v. Ouelette*, 479 U.S. 481, 497-98 (1987); *Brown v. Hotel and Restaurant Employees and Bartenders Int'l Union Local 54*, 468 U.S. 491, 505-06 (1984). And in *Motor Vehicle Mfrs. Ass'n v. Abrams*, 899 F.2d 1315, 1319 (2d Cir. 1990), *cert. denied*, 111 S. Ct. 1122 (1991), the court held that a federal law which expressly preempted state laws that "relate to" certain subjects was to be given a narrow reading, particularly in the face of a savings clause stating that "[n]othing in this chapter shall invalidate or restrict any right or remedy of any consumer under State law or any other Federal law."[6]

But if section 1106 does preserve state laws such as the one at issue here, what did Congress have in mind when it enacted section 105? To that question we now turn.

B. *Section 105 Applies Only in the Areas of Licensing and Operational Decisions.*

The text and history of the Deregulation Act indicate that Congress intended to inject more competition into the airline industry and to give the airlines, not the CAB, the final say in deciding what routes to serve and what rates to charge. As we now demonstrate, the thrust of the Deregulation Act was to end federal price and entry controls, and section 105 was intended to preempt the states from enacting their own. It is simply erroneous to equate a decision to preempt this element of airline economics with a decision to preempt all other forms of regulation, including state consumer protection laws.

Properly understood, Congress's intent was that the Deregulation Act would give the airline industry, which had previously been regulated as a public utility, the same freedom to compete which is available to "unregulated" industries, which of course are

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[6] We note in passing that section 1106 has an impressive pedigree, having been modelled on a similar provision of the Interstate Commerce Act of 1887, which regulated the railroads. *See Pennsylvania R. Co. v. Puritan Coal Mining Co.*, 237 U.S. 121, 129-30 (1915); *American Express Co. v. Teitel*, 119 Misc. 2d 822, 464 N.Y.S.2d 947 (Civ. Ct. 1983).

subject to the same state laws proscribing unfair and deceptive practices that the Fifth Circuit found to be preempted here. For most of this century the FTC and the states have shared responsibility for regulating unfair and deceptive practices of these "unregulated" companies, and it is generally accepted that these two systems of regulation coexist comfortably with each other. *See General Motors Corp. v. Abrams*, 897 F.2d 34, 36 (2d Cir. 1990); *American Financial Services Ass'n v. FTC*, 767 F.2d 957, 989-91 (D.C. Cir. 1985), *cert. denied*, 475 U.S. 1011 (1986). Indeed, state laws on a subject can remain intact even if the FTC has adopted a trade rule dealing with the same subject. *Mobil Oil Corp. v. Attorney General*, 361 Mass. 401, 408-411, 280 N.E.2d 406, 412-14 (1972). Thus, a holding that airlines are immune from state laws regulating deceptive practices would grant airlines a special exemption which is not available to other industries.[7]

The Fifth Circuit cited bits and snippets of the legislative history for the proposition that Congress wanted to end "confusion" as well as "uncertainties and conflicts" which then existed as a result of twin systems of federal and state regulation. Pet. App. at 31a. However, the court failed to identify the specific problems Congress had in mind, and an examination of that history shows that state regulation of advertising was not one of them.

The hearings and reports accompanying the Deregulation Act indicate that Congress was trying to address several specific problems. The first was the effort by some states to regulate *intra*state operations of interstate airlines. For example, Pennsylvania authorities disallowed fares on flights between Philadelphia and Pittsburgh which had been approved by the CAB. The California PUC was also trying to regulate the fares of interstate airlines flying intrastate routes and was threatening to shut down a federally approved helicopter carrier which sought to ferry passengers between airports and downtown areas in Los

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[7] The long-standing nature of this dual system of regulation buttresses our claim here, especially in light of this Court's comment that "[w]e may profitably look to judicial interpretation of § 5 [of the FTC Act] as an aid in the resolution of . . . questions raised under § 411." *American Airlines, Inc. v. North American Airlines, Inc.*, 351 U.S. 79, 82 (1956).

Angeles and San Francisco. Senate Report at 98.[8]

A second question was whether and to what extent airlines such as PSA and Southwest, which in 1978 operated solely in one state, would be subject to state regulation if they obtained authority to fly interstate routes.[9] A third issue was whether intrastate flights which, for air traffic control reasons, had to pass over the airspace of another state or fly more than three miles off shore should be viewed as interstate or intrastate operations.[10]

The "relating to rates, routes, or services" language of section 105 first surfaced in 1976 as part of a CAB-drafted reform bill. The Board explained that this section was added "to make clear that no state or political subdivision may defeat the purposes of the bill by regulating interstate air transportation. This provision represents a codification of existing law and leaves unimpaired the states' authority over intrastate matters."[11] In June 1977, Lee West, the Acting Chairman of the CAB testified that the Board hoped that "state regulatory agencies would not seek to initiate or increase air transport regulation at the time that Federal regulation is being loosened or withdrawn and thus frustrate the intent of Federal regulatory reform legislation." 1977 House Hearings at 353. Section 105 was proposed so that "the States not move into the void that we more or less create by any withdrawal, under the various proposals, from regulation." *Id.* at 354. He found it likely, however, that "as the Federal Government withdraws from the economic regulatory arena, the States will become increasingly active in areas which have historically been of local concern, *such as consumer protection . . .*" (emphasis added). *Id.* at 353.

During hearings on this proposal and others, airline officials complained that there should be even greater preemption, citing the problems outlined above, while state regulators objected to what they saw as a proposal to eliminate their ability to control intrastate operations. Over the course of that debate, no airline witness complained about state regulation of advertising, nor was the threat of state law liability after *Nader* cited as something which Congress should eliminate, leaving federal law as the only source of a remedy for bumped passengers.[12]

The initial Senate version of the Deregulation Act contained language similar to what is now found in section 105(a)(1), which the CAB supported on the ground that it "would only preclude state regulation which could frustrate the intent of Federal regulatory reform legislation by substituting state utility-type regulation for Federal regulation being loosened or withdrawn."[13] A section-by-section summary of that bill, prepared by the Senate Commerce Committee and cited by a number of witnesses, indicated that this was what the proposed section 105 was in-

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[8] *See also Aviation Regulatory Reform: Hearings before the Aviation Subcomm. of the House Comm. on Public Works and Transportation*, 95th Cong., 1st Sess. 263-64 (1977)(statement of Public Utilities Commission of Pennsylvania)("1977 House Hearings").

[9] *See Regulatory Reform in Air Transportation: Hearings before the Aviation Subcomm. of the Senate Comm. on Commerce, Science and Transportation*, 94th Cong., 2d Sess. 1306-07 (1976)(testimony of National Association of Regulatory Utility Commissioners)("1976 Senate Hearings").

[10] *See Regulatory Reform in Air Transportation: Hearings before the Aviation Subcomm. of the Senate Comm. on Commerce, Science and Transportation*, 95th Cong., 1st Sess. 140-41 (1977)(separate statement of CAB Member G. Joseph Minetti)("1977 Senate Hearings"). *See also Reform of the Economic Regulation of Air Carriers: Hearings before the Aviation Subcomm. of the House Comm. on Public Works and Transportation*, 94th Cong., 2d Sess. 1273-74 (1976)(statement of National Association of Regulatory Utility Commissioners)("1976 House Hearings").

[11] The CAB bill was introduced upon request as S. 3536, the Aviation Amendments of 1976, and is reproduced in the 1976 Senate Hearings at 119-60, as well as in the 1977 House Hearings at 197-230. The preemption language is in section 4 of the CAB bill, 1977 House Hearings at 200, and the quoted language from the Board's summary analysis appears in the 1977 House Hearings at 243.

[12] For examples of airline complaints about state economic regulation, *see* 1976 Senate Hearings at 780 (statement of Allegheny Airlines) and 1977 House Hearings at 679 (statement of Western Airlines). For examples of complaints by state regulators that proposed section 105 was going too far, *see* 1977 House Hearings at 1059-60 (statement of California Public Utilities Commission) and 1977 Senate Hearings at 1248 (statement of National Association of Regulatory Utility Commissioners).

[13] The initial Senate version of the Deregulation Act was S. 689, 95th Cong., 1st Sess. (1977), reproduced at 1977 Senate Hearings at 55-96, with proposed section 105 reproduced at page 63 of those hearings. The CAB testimony quoted in the text appears at page 191 of those hearings.

tended to do.[14] The Senate bill which emerged from committee and was approved by the Senate barred states from "determining routes, schedules, or rates, fares, or charges in tariffs, of, or otherwise promulgate economic regulations for" any airline licensed by the CAB, and it clarified the interstate/intrastate regime by stating that intrastate carriers such as PSA and Southwest could continue to be subject to state regulation until such time as they earned at least 50 percent of their revenues from interstate operations. S. 2493, § 17, 95th Cong., 2d Sess. (1978), *reprinted in* Senate Report at 39.[15]

The Senate Report nowhere suggests that state consumer protection laws (or other laws, for that matter) are contributing to what the Report termed (at 98) a "confusing system of dual regulation of federally certificated air carriers that has evolved in some States." This omission is noteworthy, since *Nader* -- decided while the deregulation debate was underway -- specifically endorsed a "system of dual regulation" in the area of overbooking and made it clear that even with a federal rule on the books, airlines which overbook their flights could nonetheless be subjected to the differing liability and damages regimes in the 50 states.

Both the initial and final House versions of the Deregulation Act contained the "relating to rates, routes, or services" language first recommended by the CAB, along with section 105(c) which clarified that previously intrastate airlines would be subject only to federal regulation once they obtained a CAB certificate.[16] The

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[14] *See* 1977 Senate Hearings at 1267 (statement of California Public Utilities Commission); *id.* at 1291 (statement of AFL-CIO).

[15] The 50 percent provision sought to remedy another regulatory anomaly. *Intra*state fares in California and Texas were lower than *inter*state fares for flights of comparable distances, and airlines such as PSA and Southwest were deterred from seeking a CAB license to fly interstate routes because they would be forced to charge the higher CAB-mandated fares on their intrastate flights. The 50 percent provision was designed to give intrastate carriers some flexibility to operate outside their home state without having to boost fares on their intrastate routes. Senate Report at 99.

[16] The initial House version was H.R. 8813, 95th Cong., 1st Sess. (1977), (cont'd)

House Report explained (at 15) that section 105 was intended to clarify "the jurisdiction of the States and the Federal Government over airlines which provide both intrastate and interstate service." It added that the existing law had "created uncertainties and conflicts," with airlines being required to charge different fares for passengers traveling between two cities on the same airplane, depending on whether they were interstate or intrastate passengers. *Id.* at 16. *See People of the State of California v. CAB*, 581 F.2d 954 (D.C. Cir. 1978), *cert. denied*, 439 U.S. 1068 (1979). Thus, section 105 was intended to "prevent conflicts and inconsistent regulations by providing that when a carrier operates under authority granted pursuant to title IV of the Federal Aviation Act, no State may regulate that carrier's routes, rates or services." House Report at 16.[17] The conferees adopted the House provision as the final version of section 105(a)(1), and the Conference Report contained no new commentary. H.R. Conf. Rep. No. 95-1779, 95th Cong., 2d Sess. 95 (1978).

Section 105 thus reflects an attempt to preclude the states from making the sort of public utility-style licensing and operational decisions which the CAB had previously made. Having decided to get the federal government out of the business of telling airlines where to fly and how much to charge, Congress did not want the lack of federal regulation to be seen as a license for the states to embark on such efforts. Yet on the precise question raised here, there is not a shred of evidence that Congress intended to preempt state laws which do not impinge on airline

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section 3 of which proposed adding the "relating to rates, routes, or services" language of section 105. 1977 House Hearings at 56. The final House version of section 105, as passed by the committee and approved by the full House, is H.R. 12611, § 4, 95th Cong., 2d Sess. (1978), *reprinted in* House Report at 40.

[17] The bill thus addressed the specific problems identified during the hearings. By stating that an airline which obtains a CAB license is subject only to CAB regulation, the bill clarified the status of previously intrastate companies such as PSA and Southwest when they obtained interstate operating authority. The bill also made it clear that "service between two cities in a State is not subject to CAB jurisdiction solely because the aircraft passes over places outside the State." House Report at 16. The House report did not mention state laws of the sort at issue here as a source of the "uncertainties and conflicts" which Congress sought to remedy.

operations in this way.[18]

The Fifth Circuit tried to bootstrap its conclusion that preemption was intended in 1978 by examining the CAB Sunset Act, which Congress passed six years later, and purported to find support for its broad reading of section 105 there. Pet. App. 32a. This argument is curious since the 1984 Act did not amend section 105 or section 1106, and one cannot rely upon subsequent legislation to explain the intent of a prior Congress. More fundamentally, the argument does not withstand scrutiny because the Fifth Circuit failed to identify the problem that Congress was trying to

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[18] Congress's use of the word "services" in section 105 does not suggest that this provision has a broader reach. Indeed, the portions of the House Report cited in the text describe various "services" covered by section 105, and elsewhere in the Act the word refers to various airline operations that are offered to the public, *e.g.*, scheduled passenger, charter cargo, air ambulance and other types of "services." *See* Federal Aviation Act § 404(a), requiring the provision of "safe and adequate service, equipment, and facilities," as well as "reasonable through service" with airlines offering connecting service (49 U.S.C. App. § 1374(a)); *id.*, § 401(e)(6), allowing scheduled carriers to perform charter trips or other "special service" (49 U.S.C. App. § 1371(e)(6)).

Similarly, under CAB licensing rules in effect at the time of the Deregulation Act or adopted to implement its provisions, anyone seeking a license to operate an airline must file a "statement as to the type of aircraft applicant proposes to use in the new service...." 14 C.F.R. § 201.4(c)(5). An airline's "route authority" includes the right "to provide service between and among various points except service which has been designated as essential air service [*i.e.*, the small community service program]." *Id.*, § 204.2(l). A "substantial change in operations" is defined as "changes in operations from charter to scheduled service, cargo to passenger service, or short-haul service to long-haul service, or a large increase in the number of markets served." *Id.*, § 204.2(m). Applicants wishing to operate as a small air taxi must describe the "type of service the carrier will offer (scheduled passenger, scheduled cargo, mail under a U.S. Postal Service contract, on-demand passenger, on-demand cargo, or other service such as air ambulance operations, firefighting or seasonal operations)." *Id.*, § 298.21(c)(iv).

Also, a 1979 CAB policy statement states that certain "services" which are offered "as a *quid pro quo* for passenger's fare" cannot be regulated by the states, *e.g.*, such as flight frequency, in-flight smoking or meal service. 44 Fed. Reg. 9948, 9951 (col. 1)(15 February 1979). As Part C discusses in more detail, this rule may prevent states from telling airlines *what* to offer their customers, but it does not preempt state remedies if those offerings are made in a deceptive manner, as Texas claims here.

solve in 1984.

The problem Congress confronted in 1984 was that section 411 was slated to "sunset" at the end of that year; if that occurred, the federal government would be unable to police anti-competitive and unfair or deceptive practices in the airline industry. *See* p. 4 and note 2, *supra*. In practical terms, the demise of section 411 would also mark the end of CAB rules in such areas as overbooking, liability limitations for lost or damaged baggage, terms of charter service, and notice to passengers regarding the terms of their contracts. H.R. Rep. No. 98-793, 98th Cong., 2d Sess. 4 (1984)("House Sunset Report").

The CAB Sunset Act responded to this problem by simply transferring to DOT the CAB's enforcement and rulemaking authority under section 411, along with the CAB's existing consumer protection rules. 49 U.S.C. App. §§ 1551(b)(1)(E), 1556(a). In language which is relevant here, the House Sunset Report expressed the view (at 4) that "there should continue to be authority in the Federal government to protect consumers against unfair and deceptive practices," adding that while existing "regulations touch relatively limited areas of airline operations they furnish important protections for consumers and we do not wish to see these regulations end precipitously when CAB sunsets."

It was in that context -- the anticipated demise of these CAB rules -- that the House Sunset Report then talked about uniformity and how existing CAB regulation "insures a uniform system of regulation and preempts regulation by the states." *Id.* The Report spoke of the need to avoid "confusion and burdensome" situations for passengers if the federal government withdrew "precipitously" from the field and the 50 states tried to restore the *status quo* by adopting their own rules on baggage liability limitations, terms of charter service, etc. *Id.*

Thus, the concern about uniformity which the Fifth Circuit cited does not reflect a desire by Congress to freeze the states out of consumer protection activities entirely. Instead, the concern was over the lack of uniformity which would result if (1) *existing* federal rules were swept off the board, (2) the states tried to fill the gap in a manner which produced conflicting and inconsistent obligations on the airlines, *and* (3) the federal government had no statutory power to address the situation. This last point is crucial because, as the House Sunset Report conceded (at 4), the CAB's

consumer protection rules covered only a limited range of activities, and, at least prior to the current wave of litigation over preemption, it was clear that state laws provided other avenues for seeking redress if there were no federal rule on the subject and sometimes (as in the overbooking area) even if there is a federal rule which deals with a particular issue.

Thus, the legislative history establishes at most an intent (1) to avoid having *no* federal statutes or rules covering those unfair or deceptive practices which the federal government regards as worthy of federal regulation, (2) to preserve uniformity in those areas where there *is* a federal rule on the books, and (3) to assure that the federal government retains the statutory authority to police consumer problems in the future, as the need may arise. *Id.* But it requires a considerable leap -- and one not supported by the text or history of the 1978 and 1984 acts -- to say that Congress wanted the states to be totally ousted from their traditional consumer protection role in cases such as this.

One case which nicely captures the distinctions between what Congress did and did not intend to preempt is *Hiawatha Aviation of Rochester, Inc. v. Minnesota Dep't of Health*, 389 N.W.2d 507 (Minn. 1986), where section 105 was held to preempt a state health department from denying an operating license to an air ambulance company. The court added that section 105 does not, however, oust a state from its "traditional role in the delivery of medical services -- the regulation of staffing requirements, the qualifications of personnel, equipment requirements, and the promulgation of standards for maintenance of sanitary conditions," *id.* at 509, even though such rules arguably "relate to" the air ambulance "service" being offered.

One final point needs to be considered in assessing the reach of section 105, namely, that this statute is not the only weapon in the federal government's preemption arsenal. Thus, a court need not strain to fit state laws into the section 105 pigeonhole for fear that inconsistent and conflicting state law obligations will otherwise be imposed on the industry. In the consumer protection area, a properly enacted DOT rule may preempt state laws, either when the federal rule shows an intent to occupy the field or when an airline would be subject to inconsistent or conflicting requirements. *But see Nader v. Allegheny Airlines*, *supra* (presence of a federal rule does not automatically cuts off state remedies for

bumped passengers).

Moreover, other provisions of the Act may preempt state laws which "relate to" airline "rates, routes, or services" in some abstract sense. This point is illustrated by *French v. Pan Am Express, Inc.*, 869 F.2d 1 (1st Cir. 1989), where an airline pilot argued that he could not be tested for drugs under a state law barring such testing. Rather than debate whether this state law somehow "relates to" the airline's rates, routes or services, *id.* at 3, the court focused on other provisions of the Act dealing with air safety and pilot qualifications, and it found preemption based on the fact that Congress had stated an "unmistakably clear intent to occupy the field of pilot regulation related to air safety, to the exclusion of state law." *Id.* at 6.[19]

These arguments explain why there is no basis to conclude that Congress has preempted the state laws at issue here, either expressly or based on some implicit intent to occupy the field. Nor, as we now show, can preemption be based on any regulatory actions taken by the CAB or DOT in administering section 411 of the Act.

C. *No Regulatory Action Preempts Texas' Claims Here.*

It has been argued in litigation over this issue that, apart from section 105, preemption can also be found on the basis of three orders issues by federal agencies: a 1979 CAB policy state-

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[19] Air safety is regulated under Title VI of the Act (49 U.S.C. App. §§ 1421 *et seq.*), which the Deregulation Act did not alter. *See* 49 U.S.C. App. § 1307. The federal government has exclusive authority to regulate safety, *see Air Line Pilots Ass'n v. Quesada*, 276 F.2d 892, 894 (2d Cir. 1960); *World Airways, Inc. v. International Bhd. of Teamsters*, 578 F.2d 800, 803 (9th Cir. 1978), although state tort law governs in the event of an airplane accident or similar occurrence caused by unsafe practices. *See* pp. 9-10 & n.3, *supra*.

For example, one case which could have found preemption without regard to section 105 is *O'Carroll v. American Airlines, Inc.*, 863 F.2d 11 (5th Cir.), *cert. denied*, 490 U.S. 1106 (1989), where a passenger sued after an airline refused to board him because of allegedly drunk and disorderly conduct. Preemption could have been found under 49 U.S.C. App. § 1511, which allows an airline to refuse transportation "when, in the opinion of the carrier, such transportation would be inimical to safety of flight."

ment which preempted various areas of airline operations, but did not mention advertising; a 1989 DOT proposal to amend its policy statement against unbundling, which is not yet final; and a 1989 settlement order setting forth a statement of DOT's prosecutorial policies. *See* pp. 5-6, *supra*. Before explaining why none of these actions preempts the state's claim, there is one overall point which applies to all three orders.

This Court has been willing to find that a federal *statute* preempts state law even if no preemptive intent is expressly stated. *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 300 (1988). The Court has, however, hesitated to find that a rule or order issued by a federal *agency* has preemptive intent unless that intent is clearly and definitively spelled out. As was explained in *Hillsborough County v. Automated Medical Laboratories, Inc.*, *supra*, "agencies normally address problems in a detailed manner," more so than is possible when a legislative body is writing a statute, and thus "we can expect that they will make their intentions clear if they intend for their regulations to be exclusive." 471 U.S. at 718. Further, if "an agency does not speak to the question of pre-emption, we will pause before saying that the mere volume and complexity of its regulations indicate that the agency did in fact intend to preempt." *Id. Accord, California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 583 (1987); *North Dakota v. United States*, 110 S. Ct. 1986, 1998 (1990). Indeed, in those cases where regulatory preemption was found, the Court noted that the rule at issue expressed a clear preemptive intent. *E.g., Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 705 n.10 (1984); *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuestra*, 458 U.S. 141, 154-59 (1982). With these standards in mind, we take each order in turn.[20]

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[20] Before doing so, though, we note that a pending certiorari petition which involves section 105 also raises a regulatory preemption issue of the sort discussed in the text. If the Court should reach the issue of regulatory preemption in this case, we respectfully ask it to do so with this other case in mind.

In *West v. Northwest Airlines, Inc.*, 923 F.2d 657 (9th Cir. 1991), *pet. for cert. pending*, No. 91-505, the court held, without citation of authority, that federal overbooking rules preempt state laws allowing a bumped passenger to seek punitive (cont'd)

1. *The 1979 CAB Policy Statement.* Four months after the Deregulation Act took effect, CAB adopted 14 C.F.R. § 399.110 (1991), a policy statement which spelled out the reach of section 105, including a statement to the effect that the Board was "occupying the entire field of economic regulations" with respect to the industry, 44 Fed. Reg. 9948 (col. 3)(15 February 1979). A close reading of this policy statement and its preamble discloses, however, that, whatever other areas may be preempted by this policy statement, advertising is not one of them.

The Board's preamble to this policy statement construes section 105 the same way that we do here. Thus, the Board stated that a state "may not interfere with a federal carrier's decision on how much to charge or which markets to serve," nor may it "establish licensing requirements" or require airlines "to adopt any particular rate." 44 Fed. Reg. 9951 (col. 1). Among the areas specified as off-limits to state regulation efforts are in-flight smoking, liability regulation for baggage loss, and charges for headsets, alcoholic beverages and entertainment. *Id.* The Board added that this preemption extends to "all of the economic factors that go into the provision of the *quid pro quo* for passenger's fare, including flight frequency and timing, liability limits, reservation and boarding practices, insurance, smoking rules, meal service, entertainment, bonding and corporate financing; and we hereby occupy *these* fields completely." *Id.* (emphasis added).

Conspicuously absent from this list of "fields" being "com-

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damages. *West* concluded that a punitive damages award would punish the practice of overbooking, which the federal rules allow, and that therefore punitive damages claims must be preempted to avoid a supposed conflict. *Id.* at 661. The error there, apart from overlooking punitive damages cases such as *Silkwood v. Kerr-McGee Corp.*, *supra*, and *California v. ARC America Corp.*, *supra*, is that the conduct which the bumped passenger challenged was not overbooking, but the airline's failure to pick up the telephone and advise him of changed conditions which increased the odds that he would be bumped. Thus, as in *Nader*, a punitive damages award would not punish the act of overbooking, but failure to provide proper notice, a distinction the court of appeals overlooked. *West* also failed to follow *Hillsborough County* when it found regulatory preemption even though the CAB and DOT have never in 30 years of rulemaking purported to preempt *any* state law. *See* note 4, *supra*. Indeed, federal overbooking rules require airlines to tell bumped passengers that they may pursue state law remedies and never hint that punitive damages may be unavailable. 14 C.F.R. § 250.9(b)(1991).

pletely" occupied is state regulation of unfair or deceptive practices, both generally and with specific reference to advertising. This omission buttresses our point. It is one thing to give airlines the freedom to decide *what* "rates, routes, or services" to offer the public as the *quid pro quo* for a passenger's fare. It is something else to preempt state laws which affect *how* those services are advertised in order to protect the public from deceptive or other tortious conduct. A few examples illustrate the point.

Under both section 105 and the 1979 policy statement, states may not, for example, adopt a law requiring airlines to pay passengers liquidated damages in the amount of $1000 if they are bumped from an oversold flight, when the federal rules prescribe a maximum recovery of $400. That does not mean that state tort remedies of the sort recognized in *Nader* are preempted, and as we observed at note 4, *supra*, neither the CAB nor DOT has ever regarded its rules as the sole remedy for bumped passengers. So too, a state cannot require that vegetarian meals be served on all flights, but that does not mean that a passenger who contracts food poisoning from either vegetarian or any other airplane food lacks a tort remedy under state law. And of course, a state may not set air safety standards, but that fact would not affect an airline's tort liability to its passengers in the event of a crash. Thus, while a state cannot tell an airline what fare to charge for its services, it can seek to assure that the fare set by the airline -- whatever it may be -- is advertised in a truthful and non-misleading fashion. *See Abrams v. TWA*, *supra*, 728 F. Supp. at 176.

2. *DOT's 1989 Notice of Proposed Rulemaking.* It has also been argued below that preemption can be found on the basis of a Notice of Proposed Rulemaking issued by DOT in 1989 (*see* p. 6, *supra*), which proposed amending the current policy statement which prohibits unbundling (14 C.F.R. § 399.84) to make it clear that taxes and surcharges could be unbundled from an airline's price advertising without violating section 411. The theory is that the NPRM represents DOT's current thinking, even though the current policy statement makes it quite clear that unbundling is illegal under both federal, as well as state guidelines.

There is no authority that *proposed* rules can have preemptive effect, even though final rules may preempt state law. Moreover, notice and an opportunity to comment on proposed rules are not mere technicalities, but an essential ingredient in the federal

rulemaking process, required by considerations such as fundamental fairness. Regulations have the same effect as statutes and should be enacted publicly and with public participation; an agency's decision to bypass this requirement can thus result in a court striking down a federal rule in its entirety. *See Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 547 (D.C. Cir. 1983). Indeed, that is what happened in *Alaska v. DOT*, where the District of Columbia Circuit overturned DOT's attempt to amend the existing policy statement on advertising without going through notice-and-comment rulemaking. *See* p. 5, *supra*.

Moreover, the Administrative Procedure Act requires federal agencies to consider and respond to all comments received on a proposed rule, including those arguing against the proposal. To avoid having the rule struck down under the APA, an agency must "respond in a reasoned manner to the comments received, to explain how the agency resolved any significant problems raised by the comments, and to show how that resolution led the agency to the ultimate rule." *Rodway v. U.S. Dep't of Agriculture*, 514 F.2d 809, 817 (D.C. Cir. 1975)(footnote omitted); *see also Telocator Network v. FCC*, 691 F.2d 525, 545 (D.C. Cir. 1982). Thus, a proposed rule has no more legal force than a bill which has passed both houses of Congress, but has not been signed by the President.

3. *The 1989 Consent Order.* Nor can preemption rest on the 1989 consent order settling a false advertising case in which DOT stated that it does not intend to prosecute violations of the unbundling prohibition in § 399.84. *See* p. 6, *supra*. Passing the serious due process questions which are present if an agency seeks to preempt state law through adjudication, rather than public rulemaking, DOT's statement about its intentions is not a binding adjudication which has the force of law, but a non-reviewable statement of prosecutorial discretion. *See Heckler v. Chaney*, 470 U.S. 821 (1985). Moreover, since DOT has chosen to articulate its advertising policy through rulemaking, it cannot, for preemption purposes and consistent with the Administrative Procedure Act, undo that policy by any means other than rulemaking. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983).

CONCLUSION

The judgment of the court of appeals should be reversed.

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13 January 1992

(11)

No. 90-1604

Supreme Court, U.S.
FILED
FEB 10 1992
OFFICE OF THE CLERK

IN THE

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OCTOBER TERM, 1990

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Petitioners,

—v.—

TRANS WORLD AIRLINES, INC. *et al.*,
Respondents.

BRIEF *AMICUS CURIAE* OF THE ASSOCIATION OF NATIONAL ADVERTISERS, INC., IN SUPPORT OF RESPONDENTS

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TRANS WORLD AIRLINES, INC. *et al.*,
Respondents.

BRIEF *AMICUS CURIAE* OF THE ASSOCIATION OF NATIONAL ADVERTISERS, INC., IN SUPPORT OF RESPONDENTS

INTEREST OF THE AMICUS CURIAE

The Association of National Advertisers, Inc., (A.N.A.) respectfully submits this brief *amicus curiae* in support of respondents in this case. Letters of consent to the filing of this brief have been lodged with the clerk.

The Association of National Advertisers, Inc., the industry's oldest trade association, is the only organization exclusively dedicated to enhancing the ability of businesses to advertise both nationally and regionally. With more than 2,000 subsidiaries, divisions and operating units, A.N.A. members market a kaleidoscopic array of goods and services and account for almost 80% of annual national and regional advertising expenditures in the United States.

As the nation's principal community of commercial speakers, A.N.A. has long been committed to the advancement of commercial speech as an integral component of the robust competition that powers a free market economy. As national advertisers, the members of A.N.A. are acutely aware of the costs and drawbacks of patchwork local regulation of the commercial speech process. When speakers seeking to communicate with an interstate audience are forced to comply with a series of overlapping, conflicting and burdensome state and local rules, two adverse speech consequences inevitably follow. First, the duty to comply with bureaucratic local speech regulations impedes effective communication by complicating and, often, precluding the most effective messages. Second, the cost of local tailoring imposes a significant and wholly unnecessary economic burden on the commercial speech process.

Where, as in this case, Congress has elected to establish uniform national standards governing a significant category of commercial speech in order to avoid the drawbacks imposed by patchwork local regulation, A.N.A. believes that deference to Congress' will requires preemption of state and local rules of law.

STATEMENT OF THE CASE

Although this case raises important questions of regulatory policy, it arises out of a simple dispute over the format of airline price advertisements. Given the complexity of current pricing arrangements in the airline industry, the base fare is often supplemented by variable costs, such as customs fees, baggage transit fees, airport departure fees, taxes, fuel surcharges and security costs. Moreover, time and use restrictions designed to tie prices to marginal cost often complicate the fare structure.

Many airlines advertise the base fare separately and disclose the additional costs and fees, as well as any user restrictions, elsewhere in the advertisement. The National

Association of Attorneys General (NAAG), issued guidelines in 1987 requiring the "bundling" of all cost and user information into the same space in an advertisement. The Attorney General of Texas threatened prosecution of five airlines under state consumer protection laws unless they adopted the "bundling" format for interstate rate advertising in Texas. Full disclosure of the relevant additional information elsewhere in the advertisement was explicitly deemed inadequate. (J.A. at 152a).

The airlines resisted, obtaining injunctive relief on preemption grounds against state prosecution. *TWA* v. *Mattox*, 897 F.2d 773 (5th Cir.), *cert. denied*, 111 S.Ct. 308 (1990). This appeal followed in due course. See *TWA* v. *Morales*, 924 F.2d 1055 (5th Cir. 1991).

Thus, the actual issue that divides the parties is a narrow one. All agree that it is both necessary and proper to inform consumers that additional costs and use restrictions exist. The only disagreement is over whether the information may be "unbundled" from the base rate and disclosed elsewhere in the advertisement, or must be "bundled" with the base rate.

SUMMARY OF ARGUMENT

Congress, in enacting the Airline Deregulation Act of 1978, expressly preempted all state laws "relating to rates, routes and services"[1] of interstate airlines. Such an express displacement of state law preempts attempts by the states to dictate the form and content of airline rate advertising for four reasons.

First, the literal text and context of the 1978 Act makes clear that its "plain meaning" was to prevent the states from interfering in the free market process by which airline rates, routes and services are determined. Since robust price advertising is critical to effective price competition, efforts to control the advertising process inevitably impact on the

1 49 U.S.C. app § 1305(a)(1)

competitive rate structure itself. *Pilot Life Ins. Co.* v. *Dedeaux*, 481 U.S. 41 (1987).

Second, the "plain meaning" of the express preemption provision is confirmed by the construction afforded it by the United States Department of Transportation (DOT), the agency vested with responsibility for implementing Congress' will. *Chevron, U.S.A. Inc.* v. *NRDC Inc.*, 467 U.S. 837 (1984). DOT has consistently construed the relevant statutory language as preempting state attempts to dictate the form and content of airline rate advertising. See *Hillsborough County* v. *Automated Medical Laboratories, Inc.*, 471 U.S. 707, 717 (1985).

Third, preemption is particularly appropriate in a setting, as here, where Congress seeks to achieve uniform, nationwide rules governing speech. Congress' desire to assure uniform national standards governing the regulation of speech has consistently been at the core of the Court's preemption cases. Eg. *Hines* v. *Davidowitz*, 312 U.S. 52 (1941); *Garner* v. *Teamsters Union*, 346 U.S. 485 (1953); *Franklin National Bank* v. *New York*, 347 U.S. 373 (1954); *Pennsylvania* v. *Nelson*, 350 U.S. 497 (1956); *San Diego Bldg. Trades Council* v. *Garmon*, 359 U.S. 236 (1959); *Farmers Union* v. *WDAY, Inc.*, 360 U.S. 525 (1959); *Teamsters Union* v. *Morton*, 377 U.S. 252 (1964); *Motor Coach Employees* v. *Lockridge*, 403 U.S. 274 (1971); *Machinists* v. *Wisconsin Employment Relations Comm'n*, 427 U.S. 132 (1976); *Jones* v. *Rath Packing Co.*, 430 U.S. 519 (1977); *Michigan Canners & Freezers* v. *Agricultural Board*, 467 U.S. 461 (1984); *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691 (1984); *City of New York* v. *F.C.C.*, 486 U.S. 57 (1988). See also *Edgar* v. *MITE Corporation*, 457 U.S. 624, 630-640 (1982).

Finally, this Court has been particularly sensitive to the need for preemption in settings where, as here, Congress has expressed an intention to impose uniform rules of conduct on a significant economic activity in order to permit national market forces to operate free from local distortions. *Ingersoll-Rand Co.* v. *McClendon*, 111 S.Ct. 478 (1990); *FMC* v. *Holliday*, 111 S.Ct. 403 (1990); *Mackey* v. *Lanier Collection Agency & Service, Inc.*, 486 U.S. 825 (1988); *Shaw* v. *Delta Airlines*, 463 U.S. 85, 91 (1983); *Machinists* v. *Wisconsin Employment Relations Comm'n*, 427 U.S. 132 (1976); *Golden State Transit Corp.* v. *Los Angeles*, 475 U.S. 608 (1986).

ARGUMENT

STATE LAWS PURPORTING TO GOVERN THE FORM AND CONTENT OF AIRLINE RATE ADVERTISING ARE PREEMPTED BY CONGRESS' DECISION TO DISPLACE ALL STATE LAWS "RELATING TO RATES, ROUTES AND SERVICES" OF INTERSTATE AIRLINES

INTRODUCTORY STATEMENT

Tension exists between state laws purporting to mandate the form and content of interstate airline rate advertising and Congressional regulatory policy, strongly committed since 1978 to robust price competition in the airline industry. In theory, of course, no collision exists between robust price competition and sensible consumer protection laws. In practice, however, over-zealous application of multiple, potentially inconsistent state laws governing the form and content of airline rate advertising inhibits robust price competition in at least four ways.

First, the very fact of requiring compliance by interstate airlines with a patchwork of state and local laws with different definitions of what counts as "deceptive"; different rules as to mandatory disclosure; and different standards as to required format, dramatically raises the cost and lowers the effectiveness of competitive price advertising.[2] Tailoring an

2 As Texas notes, the NAAG Guidelines are merely "general enforcement policies" and are fully subject to "variations in individual state and common law". Although state consumer protection laws uniformly decry "deception", they vary widely in the specific meaning of the term, to say nothing of requirements on prophylactic disclosure and required format.

inherently interstate message to the vagaries of local consumer protection practice, even if one assumes that the varying rules are not mutually contradictory, is expensive. A.N.A. members have learned the economic fact of life that the greater the diversity of local speech rules, the less speech can be bought with the same advertising dollar. Since price advertising fuels price competition, the adverse impact on price competition of requiring burdensome compliance with multiple state and local speech standards is obvious.

Even more importantly, requiring compliance with differing state rules on the content and form of airline price advertising makes it impossible to develop a uniform national vocabulary that will facilitate comparison shopping by consumers in different states. This Court has explicitly noted the destructive effect on national comparison shopping caused by differences in state laws mandating the form and content of commercial speech. See *Jones* v. *Rath Packing Co.*, 430 U.S. 519 (1977).

Third, when bureaucrats make prophylactic rules about the content and form of price advertising and insist upon mechanical compliance with their rules, an important message may be rendered literally unspeakable. For example, the complex interplay between base-rates, surcharges, departure fees, taxes and restrictions may cause the total cost of an airline ticket to vary depending on the number and location of intermediate stops and the time of use. The logical method of conveying competitive price data in such a fluid setting is to "unbundle" the "constant" base-rate from the "variable" surcharges, fees, taxes and restrictions. If, however, state law forbids such "unbundling" by requiring that variable costs and restrictions be discussed simultaneously and identically with the "fixed" base rate, (See J.A. 152a), it becomes impossible, as a practical matter, to craft a readable competitive rate advertisement for a route involving differing intermediate stops and varying time of use restrictions.

Finally, requiring the transmission of information in a bureaucratically mandated format often obscures and con-

fuses the central message of an advertisement, draining it of persuasive impact and diluting its informational value. *Franklin National Bank* v. *New York*, 347 U.S. 373 (1954). Every would-be communicator, whether a lawyer, a teacher, a judge or an advertiser, knows that a fine line must be walked between too much and too little content in an effort to craft an effective message. Moreover, every would-be communicator realizes that the format and organization of the content plays a significant role in its informational value. Airline rate advertising is no exception. When bureaucrats require airlines to "bundle" all restrictions and costs with the base price in an effort to assure full disclosure, they inadvertently sacrifice effectiveness without materially enhancing the consumer's knowledge.[3]

Of course, recognizing that tension exists between the bureaucratic ideal of total, simultaneous disclosure and the practical necessities of effective competitive rate advertising does not mean that airline rate advertising should be free from regulation. *Amicus* recognizes the wisdom of reasonable regulatory activity aimed at assuring informed consumers. But the tension that exists between multiple bureaucratic overregulation of rate advertising and robust rate competition makes clear that drawing a thoughtful and uniform regulatory line between "too much" and "not enough" regulation of airline rate advertising is among the most sensitive and important judgments confronting airline regulators in the

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3 *Amicus* agrees, of course, that information on use restrictions and additional costs must be made available to the consumer. The only issue raised by this case is whether state bureaucrats can insist on a particular format.

The point is made most forcefully in a letter, dated November 14, 1988, from several Attorneys General to Pan Am:

> *It is no defense to claim that the surcharges are disclosed elsewhere in the advertisement.* The deception, and thus the violation of our laws, occurs when the advertisement states a specific amount for a fare which is not in fact the true cost because the surcharges have been factored out. This deception cannot be cured by a footnote or other separate reference. (emphasis added). J.A. at 152a.

Why not?

post-1978 era of free competition. The precise issue posed by this case is whether the line between "too much" and "too little" regulation of airline rate advertisements is to be drawn by federal regulatory officials on a uniform, national basis, with due regard for Congress' mandate to increase price competition, or whether each state and locality may draw the balance for itself, without regard for the effect on national transportation policy.

A. The "Plain Meaning" of the Congressional Text Defining Preemption

Texas argues that it is empowered to second-guess federal regulators in drawing the balance between too little and too much regulation of airline rate advertising.[4] The United States Department of Transportation (DOT), heir to the regulatory authority initially vested in the Civil Aeronautics Board (CAB), argues that its statutory duty to prevent "deceptive" airline practices vests it with exclusive authority to draw the appropriate regulatory balance.[5] The dispositive

4 Texas suggests that no difference exists between the relevant state and federal norms governing airline rate advertising, since both bar "deception". Petitioner's Br., p. 19. However, this case illustrates the range of meanings the legal conclusion "deceptive" can have. The precise issue in this case, whether "bundling" must be required as a prophylactic protection against deception, is an issue on which strong disagreement exists between state and federal authorities. Indeed, Texas candidly concedes that:

> DOT has consistently sided with the airline respondents in opposing regulation of airline advertising *and by permitting the exact practices which the state would prohibit.* (emphasis added). Petitioner's Br., p. 27.

5 The CAB's power to regulate deceptive advertising practices flowed from § 102(a)(7) of the Federal Aviation Act of 1958, 49 U.S.C. app. § 1302(a)(7). It was transferred to the Department of Transportation in the Civil Aeronautics Board Sunset Act of 1984. Pub. L. No. 98-443, 98 Stat. 1703. See also § 411(a) of the Federal Aviation Act, 49 U.S.C. app. § 1381(a).

question for this Court[6] is: What did Congress intend[7] when it enacted § 105(a) of the Airline Deregulation Act of 1978?[8]

The pre-1978 answer to the question is clear. From 1938-1978 airlines were not merely shielded from competition, but were affirmatively discouraged from competing. Not surprisingly, during the non-competitive era, the power to regulate airline rate advertising was shared between the Civil Aeronautics Board and state authorities. *Nader* v. *Allegheny Airlines*, 426 U.S. 290 (1976); 49 U.S.C. § 1506. During a period when the anti-competitive effect of over-regulation of price advertising was of no concern to Congress, the CAB or the airline industry, Congress was unconcerned with the development of uniform, national rules governing airline rate advertising.

In 1978, however, widespread dissatisfaction with the bloated cost structure and inadequate service record of an airline industry almost totally insulated from competition led Congress to alter the regulatory landscape dramatically. See Dempsey, *The Rise and Fall of the Civil Aeronautics Board—Opening Wide the Floodgates of Entry*, 11 Transp. L. J. 91 (1979); See also Dempsey and Thoms, *Law and Eco-*

6 State attempts to regulate the form and content of interstate airline rate advertising also raise questions under both the First Amendment and the Commerce Clause. Neither constitutional question is before this Court in this proceeding.

7 When Congress legislates pursuant to its enumerated powers, it may, pursuant to Article VI, cl. 2, elect to displace state law that interferes with the full attainment of Congressional purpose. *Gibbons* v. *Ogden*, 9 Wheat. 1, 211 (1824) (Marshall, C.J.).

8 The Airline Deregulation Act of 1978 (Pub. L. No. 95-504, 92 Stat. 1705) is codified at 49 U.S.C. app. § 1301-1552 (1982 & Supp. V 1987). The express preemption consequences of the Act are set forth in § 105(a)(1), codified at 49 U.S.C. app. § 1305(a)(1), which expressly preempts all state laws "relating to rates, routes and services". The text of § 105(a)(1) is set out *infra* at p. 10.

Significantly, § 105(a)(2) explicitly saves from preemption "proprietary powers and rights" of local airport operators. No such savings clause exists in the area of advertising regulation. See *New England Legal Foundation* v. *Massachusetts Port Authority*, 883 F.2d 157 (1st Cir. 1989)

nomic Regulation in Transportation (1986). In place of a system that had shielded airlines from competition, Congress mandated a regime of robust competition in the area of "rates, routes and services".

The shift to a regulatory philosophy in which rates were to be set by vigorous free market competition and not by bureaucrats required a corresponding shift in the allocation of power over the form and content of airline rate advertising. Congress recognized that robust price competition depended on effective price advertising which, in turn, depended on the existence of a sensible set of uniform, national rules governing the interstate airline advertising process. Accordingly, in place of the pre-1978 system of shared power, Congress expressly imposed a blanket preemption provision, stating:

> Except as provided in paragraph (2) of this subsection, no State or political subdivision thereof and no interstate agency of two or more States shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes or services of any air carrier having authority under subchapter IV of this chapter to provide interstate air transportation. 49 U.S.C. § 1305(a)(1).

At the same time, Congress vested power in the Civil Aeronautics Board (a power now exercised by the Department of Transportation) to prevent:

> . . . "unfair, deceptive, predatory or anticompetitive practices that would tend to allow one or more air carriers unreasonably to increase prices, reduce services or exclude competition in air transportation". 49 U.S.C. § 1302(a)(7). See also 49 U.S.C. app. § 1381 (a).[9]

Thus, the "plain meaning" of Congress' language compels a finding that state laws purporting to mandate the form and content of airline rate advertising are expressly preempted.

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9 Congress continued, as well, power to deal with deceptive practices dating from 1938. 49 U.S.C. app § 411(a)

Congress may preempt state law in one of three ways: (1) literally, by describing the precise practice to be preempted *in haec verba*; (2) textually, by including the preempted practice within a broad functional or categorical description of the statute's preemptive scope; and (3) impliedly, by enacting legislation that connotes an unarticulated intention to preempt the practice at issue.

In the absence of any provision expressly articulating Congress' intent to displace state law, this Court has been understandably reluctant to infer preemption. Eg., *Florida Lime and Avocado Growers* v. *Paul*, 373 U.S. 132 (1963); *Hillsborough County* v. *Automated Medical Laboratories, Inc.*, 471 U.S. 707 (1985). But where, as here, Congress has expressed its intention to preempt state law both literally and in broad functional terms, this Court has enforced the text's "plain meaning", despite efforts to impose an unrealistic requirement of descriptive particularity. *Ingersoll-Rand Co.* v. *McClendon*, 111 S.Ct. 478 (1990); *FMC* v. *Holliday*, 11 S.Ct. 403 (1990); *Mackey* v. *Lanier Collection Agency & Service, Inc.*, 486 U.S. U.S. 825 (1988); *Pilot Life Ins. Co.* v. *Deadaux*, 481 U.S. 41 (1987); *Shaw* v. *Delta Airlines*, 463 U.S. 85, 91 (1983) (broadly construing the phrase "relate to" in the context of ERISA preemption).

The phrase "relating to rates" is a literal description of the delivery of price information to the consumer. The dictionary definition of "relating to" is "to stand in some relation, to have relationship; to pertain" Webster's Int'l Dictionary, 2d ed., p. 2102 (1951). If a consumer were to call an airline directly and ask the price of a ticket to Honolulu, can it be disputed that the clerk's answer is "related to rates"? Given the complexity of the airline rate structure, the clerk would be obliged to ask a series of questions (date, hour, month, length of stay, etc.), but the entire exchange would unquestionably "relate to rates". Advertising is, of course, nothing more than a generalized transmission of information to prospective consumers. If a face-to-face request for price information elicits a response that "relates to rates", it is difficult to understand why a generalized transmission of the same

information to the public does not similarly "relate to rates." Texas' argument, therefore, seeks to substitute "directly governs rates" for the literal meaning of the phrase actually used by Congress.

Texas argues, nevertheless, that the broad categorical phrase used by Congress to describe the preemptive effect of the Airline Deregulation Act of 1978—"relating to rates, routes or services"—does not describe *in haec verba* state laws regulating the form and content of airline rate advertising. Accordingly, argues Texas, while state laws directly altering the rate structure would be literally preempted, state laws that merely regulate the flow of information about rates do not "relate to rates" within the meaning of Congress. See *Abrams* v. *Trans World Airlines, Inc.*, 728 F.Supp 162 (S.D.N.Y. 1990). But see *Abrams* v. *Trans World Airways, Inc.*, 525 N.Y.S.2d 1 (First Dept. 1991) (dismissing enforcement proceeding on preclusion grounds).

However, once Congress determined in 1978 that airline rates themselves should be set by free market competitive forces and not by administrative fiat, rate advertising became the key to the robust price competition necessary to the "setting" of a free market rate. Since regulation of rate advertising directly impinges on the "setting" of rates in a free market economy, state laws purporting to control the content and form of airline rate advertising "relate to rates" even in the narrow sense of the term advanced by Texas.

If, for example, Texas were to ban airline rate advertisements completely,[10] relying instead on an official state airline price directory, the advertising ban would unquestionably "relate to rates" (even in the narrowest sense of the phrase) since the ban would eliminate advertising as a medium of price competition, inevitably resulting in higher, non-

10 Such a ban would unquestionably violate the First Amendment. Eg. *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council*, 425 U.S. 748 (1976)

competitive rates. The regulations at issue in this case differ only in degree from such a complete ban.[11]

In effect, Texas argues that preemption can occur only when Congress utilizes a literal description of a particular practice.[12] Congressional efforts to effect preemption more broadly by describing generic or functional categories of preempted behavior would be unavailing. Such an approach to statutory construction, which confuses fidelity to the Congressional text with a slavish insistence upon a particular, literal command, would dramatically weaken Congress as a significant policy-making institution. Whenever Congress legislates, it necessarily utilizes functional or categorical descriptions of its legislative ends. Indeed, sophisticated communication of any kind is impossible without the use of abstract, descriptive phrases that are intended to include relevant specific practices. A grammar consisting solely of proper nouns is hardly an adequate vehicle for a legislature—or anyone else—in a complex democracy.

Thus, while *amicus* agrees that in the absence of textual support this Court should be wary of implying a Congressional intent to displace state law, the so-called presumption against preemption in non-textual settings should not be transformed into a mechanical demand for literal particularism in Congressional texts expressly imposing preemption. Where, as here, Congress expressly codifies its desire to preempt state law in broad, functional terms, a showing that the state practice at issue exerts a significant adverse impact on Congress' regulatory scheme brings the state practice within the "plain meaning" of the express preemption provision and should, *amicus* believes, end the discussion. See *Ingersoll-Rand Co.* v. *McClendon*, 111 S.Ct. 478 (1990); *FMC* v. *Hol-*

11 The relationship between price advertising, robust price competition and the setting of market rates is well understood. Eg., Benham, *The Effect of Advertising on the Price of Eyeglasses*, 15 J. Law & Econ. 337 (1972); Cady, *An Estimate of the Price Effects of Restrictions on Drug Price Advertising*, 14 Econ. Inquiry 493 (1976).

12 As *amicus* has shown, even the requirement of literalness has been met in this case. See *supra* at p. 11-12.

liday, S.Ct. 403 (1990); *Mackey* v. *Lanier Collection Agency & Service, Inc.*, 486 U.S. U.S. 825 (1988); *Pilot Life Ins. Co.* v. *Dedeaux*, 481 U.S. 41 (1987); *Shaw* v. *Delta Airlines*, 463 U.S. 85, 91 (1983) (broadly construing the phrase "relate to" in the context of ERISA preemption).

Finally, Texas argues that 49 U.S.C. 1506, dating from 1958, which provides:

> Nothing contained in this chapter shall in any way abridge or alter *the remedies* now existing at common law or by statute, but the provisions of this chapter are in addition to such *remedies*. (emphasis added).

connotes an intention to permit states to set varying regulatory standards governing airline rate advertising. But such an argument fails on two levels.

First, § 1506 dates from the Federal Aviation Act of 1958. Whatever its pre-1978 import, the passage of the Airline Deregulation Act of 1978, with its express pre-emption language, overrides the earlier provision.

Second, by its literal terms, § 1506 merely preserves state "remedies", not the power to enunciate multiple state substantive standards. This is not a case involving an effort to use supplemental state "remedies" to enforce substantive federal standards. See *Linn* v. *Plant Guard Workers*, 383 U.S. 53 (1966); *Farmer* v. *United Bro. of Carpenters & Joiners*, 430 U.S. 290 (1977) (preempting state substantive law, but permitting state courts to enforce federal substantive standards). Rather, it is an attempt to enforce an independent set of substantive state norms. See *Franklin National Bank* v. *New York*, 347 U.S. 373 (1947); *Jones* v. *Rath Packing Co.*, 430 U.S. 519 (1977); *Fidelity Federal Savings & Loan Ass'n* v. *de la Cuesta*, 458 U.S. 141 (1982). When Congress wished to preserve such an arena for non-uniform state substantive regulation in the 1978 Act it did so explicitly. 49 U.S.C. § 1305(a)(2) (preserving "proprietary" rights of airline operators from preemption).

Accordingly, the Circuits are correct in holding that § 1506 does not override Congress' clearly articulated desire for uniform, federal rules governing airline "rates, routes and services". *O'Carroll* v. *American Airlines, Inc.*, 863 F.2d 11 (5th Cir.), *cert. denied*, 109 S.Ct. 3158 (1989); *Hingson* v. *Pacific Southwest Airlines*, 743 F.2d 1408 (9th Cir. 1984); *French* v. *Pan Am Express, Inc.*, 869 F.2d 1 (1st Cir. 1989); *Illinois Corporate Travel* v. *American Airlines, Inc.*, 889 F.2d 751 (7th Cir. 1989).

B. The Text's "Plain Meaning" is Confirmed By the Construction Adopted By the Administrative Agency Vested With Responsibility for Implementing Congress' Commands

Amicus believes that the phrase "relating to rates" clearly preempts state efforts to regulate the form and content of rate advertising since price advertising is literally "related to rates" because it so directly impacts on the market process by which airline rates are "set". Indeed, the text's "plain meaning" is confirmed by the reading of the phrase adopted by the Department of Transportation (DOT), the agency vested since 1984 with responsibility for implementing Congress' regulatory program. *Chevron, U.S.A., Inc.* v. *NRDC, Inc.*, 467 U.S. 837 (1984).

In *Chevron*, this Court recognized that the necessary use of general language in Congressional statutes would occasionally result in situations where reasonable persons could disagree over a text's application to a specific practice. In such situations, this Court held that substantial deference was due to the plausible reading of the Congressional text adopted by the administrative agency vested with responsibility for implementing Congress' will.

Amicus believes that this is not a *Chevron* situation, because the text's "plain meaning" is manifest. But even if an ambiguity existed, DOT's consistent reading of § 105(a)(1) as preempting state laws purporting to mandate the form and content of airline rate advertising should be "dispositive" in

resolving the ambiguity. *Hillsborough County* v. *Automated Medical Laboratories, Inc.*, 471 U.S. 707, 717 (1985).

DOT's judgment that multiple state over-regulation of airline rate advertising constitutes a danger to the robust price competition mandated by Congress is precisely the kind of exercise of informed expertise that this Court found conclusive in *Chevron* and its progeny. As the administrative agency responsible for implementing Congress' plan, DOT is both functionally and democratically best-suited to resolving any doubt about whether state regulation of rate advertising "relates to" rates—functionally, because DOT possesses the expertise to measure the impact of state advertising regulation on the market processes by which rates are set; democratically, because DOT's reading of the statute is subject both to Presidential supervision and immediate alteration by Congress.

From the outset of this controversy, DOT (and the Federal Trade Commission) have construed § 105(a)(1) as preempting state efforts to regulate the form and content of airline rate advertising. On October 19, 1987, prior to the adoption of the NAAG Guidelines, DOT notified NAAG that the guidelines were preempted. *TWA* v. *Mattox*, 897 F.2d 773, 784 (5th Cir.), *cert. denied*, 111 S.Ct. 308 (1990). On March 2, 1988, after the adoption of the NAAG Guidelines, DOT notified the Attorney General of Texas that state regulation of airline rate advertising as contemplated by the guidelines was preempted and that conduct forbidden by the guidelines had been "specifically permitted by DOT". *Id* at 784. In 1989, seeking to fulfil its mandate to develop uniform rules governing airline advertising, DOT published proposed rules governing airline advertising. 54 Fed. Reg. 31,052 (1989) (Tentative Rules Governing Airline Rate Advertising), that would supplement and modify existing federal regulations in the area. 14 C.F.R. §§ 201, 221, 254, 380, and 399 (1990).[13]

13 The proposed regulations remain pending. 56 Fed. Reg. 53,614 (October 21, 1991).

Significantly, DOT has specifically ruled on two occasions that airlines may "unbundle" international departure taxes, customs fees, immigration fees and security surcharges from base fares in connection with rate advertisements—a practice that flatly contradicts the NAAG Guidelines. DOT Orders 85-12-68; 89-4-25. See *Alaska* v. *United States Department of Transportation*, 868 F.2d 441 (D.C. Cir. 1989). Finally, in this proceeding, DOT has vigorously maintained its consistent position that § 105(a)(1) expressly preempts state attempts to control the form and content of airline rate advertising.[14]

Thus, unlike settings in which an agency has merely adopted a "litigating position",[15] DOT's consistent reading of § 105(a)(1) and its repeated exercise of regulatory authority warrant *Chevron* deference.

In *Hillsborough County* v. *Automated Medical Laboratories, Inc.*, *supra*, this Court, citing *Chevron*, unanimously held that the FDA's decision to construe the Public Health Services Act as permitting parallel state and federal regulation of blood plasma centers "is dispositive on the question of . . . intent to preempt unless . . . the agency's position is inconsistent with clearly expressed congressional intent". 471 U.S. at 714. This case is the flip side of *Hillsborough*. Just as the FDA's reading of the governing statute as precluding preemption was "dispositive", so too is the DOT's reading of § 105(a)(1) as mandating preemption.

14 Texas argues that, unlike DOT, the Civil Aeronautics Board did not view § 105(a)(1) as preempting state regulation of airline rate advertising. But Congress terminated the CAB in 1984, transferring its authority over airline rate advertising to the Department of Transportation. Texas candidly discloses that, from the beginning, DOT has construed § 105(a)(1) as preempting state efforts to control the form and content of airline rate advertising. Petitioner's Br., p. 22, n. 12.

Of course, for *Chevron* purposes, it is the plausible construction of the current administrator that commands deference. *Rust* v. *Sullivan*, 111 S.Ct. 1759, 1769 (1991).

15 See *Bowen* v. *Georgetown University Hospital*, 488 U.S. 204, 212-213 (1988).

C. Preemption is Particularly Appropriate in Settings Where Congress Seeks to Assure Uniform Legal Standards Governing Speech

This Court has repeatedly recognized that when, as here, Congress regulates in areas involving speech, Congress' desire to establish uniform, nationwide rules governing speech preempts state and local attempts to alter the Congressional balance. Indeed, Congress' desire to assure uniform national standards governing the regulation of speech has consistently been at the core of the Court's preemption cases. Eg. *Hines* v. *Davidowitz*, 312 U.S. 52 (1941); *Garner* v. *Teamsters Union*, 346 U.S. 485 (1953); *Franklin National Bank* v. *New York*, 347 U.S. 373 (1954); *Pennsylvania* v. *Nelson*, 350 U.S. 497 (1956); *San Diego Bldg. Trades Council* v. *Garmon*, 359 U.S. 236 (1959); *Farmers Union* v. *WDAY, Inc.*, 360 U.S. 525 (1959); *Teamsters Union* v. *Morton*, 377 U.S. 252 (1964); *Motor Coach Employees* v. *Lockridge*, 403 U.S. 274 (1971); *Machinists* v. *Wisconsin Employment Relations Comm'n*, 427 U.S. 132 (1976); *Jones* v. *Rath Packing Co.*, 430 U.S. 519 (1977); *Michigan Canners & Freezers* v. *Agricultural Board*, 467 U.S. 461 (1984); *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691 (1984); *City of New York* v. *F.C.C.*, 486 U.S. 57 (1988). See also *Edgar* v. *MITE Corporation*, 457 U.S. 624, 630-640 (1982).

In the commercial speech context at issue in this case, this Court has long respected Congress' intention to impose uniform national standards when it regulates commercial speakers. For example, in *Franklin National Bank* v. *New York*, 347 U.S. 373 (1954), this Court held that the federal statute authorizing national banks to accept savings deposits preempted New York's limitation on the use of the word "saving" or "savings" in bank advertising. Similarly, in *Jones* v. *Rath Packing Co.*, 430 U.S. 519 (1977), this Court ruled that federal weight labeling rules preempted California's attempt to impose more stringent weight labeling standards, precisely because differing state rules would interfere with a uniform national communication system. A similar commitment to uniform national standards governing speech doomed Oklahoma's attempt to regulate liquor advertising on local cable television in *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691 (1984).

In the context of labor relations, in *Garner* v. *Teamsters Union*, 346 U.S. 485 (1953), this Court held that the National Labor Relations Act impliedly preempts state common law remedies for injunctive relief against peaceful recognitional picketing. In *San Diego Bldg. Trades Council* v. *Garmon*, 359 U.S. 236 (1959), this Court held that state common law damage claims arising out of peaceful picketing activity were, likewise, impliedly preempted by the NLRA. In *Teamsters Union* v. *Morton*, 377 U.S. 252 (1964), the *Garner-Garmon* rule was applied to preempt state common law damage claims for unlawful secondary picketing activity. Finally, in *Machinists* v. *Wisconsin Employment Rel. Comm'n*, 427 U.S. 132 (1976), this Court ruled that state laws forbidding concerted refusals to work overtime were preempted, as well.[16]

In the context of broadcast regulation, this Court has also respected Congress' desire for uniform national standards when national communications are at issue. For example, in *Farmers Union* v. *WDAY, Inc.*, 360 U.S. 525 (1959), this Court ruled that state common law actions for libel against broadcasters were preempted by the Federal Communications Act. Similarly, in *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691 (1984), this Court ruled that federal law preempted

16 See also *Bus Employees* v. *Missouri*, 374 U.S. 74 (1963); *Michigan Canners & Freezers* v. *Agricultural Board*, 467 U.S. 461 (1984).

In *Linn* v. *Plant Guard Workers*, 383 U.S. 53 (1966), the Court declined to wholly preempt claims for libel in the context of a labor dispute. Instead, the Court effected a partial preemption that displaced state libel law in private labor settings if it permitted recovery short of a showing of malice identical to the constitutional standard for political settings established in *New York Times* v. *Sullivan*, 376 U.S. 254 (1964). The net result of *Linn* was to establish highly protective uniform national legal standards governing libel in a labor context, but to rely on state courts to apply them. The Court followed the identical path in connection with suits for intentional infliction of emotional distress. *Farmer* v. *United Bro. of Carpenters & Joiners*, 430 U.S. 290 (1977).

Oklahoma's attempt to ban liquor advertising from local cable television. Most recently, in *City of New York* v. *F.C.C.*, 486 U.S. 57 (1988), New York City's attempt to set technical standards for local cable television was held preempted by the Cable Broadcasting Act.

Perhaps the most dramatic examples of the role of preemption in assuring a uniform national standard in the area of speech and association have taken place in the national security area. In *Hines* v. *Davidowitz*, 312 U.S. 52 (1941), a Pennsylvania Alien Registration statute imposing significant restrictions on the civil liberties of aliens was held preempted by the Federal Alien Registration Act because the Pennsylvania statute altered the balance between freedom and regulation set by Congress. Similarly, in *Pennsylvania* v. *Nelson*, 350 U.S. 497 (1950), the Smith Act was held to preempt attempts by the states to prosecute for sedition against the United States.

Thus, DOT's construction of § 105(a)(1) as reflecting a Congressional desire for uniform, national rules governing regulated speech is not only consistent with the statutory text and the statute's manifest purpose, it is consistent, as well, with settled Congressional tradition.

D. Preemption is Particularly Appropriate Where, As Here, Congress Has Indicated a Desire to Provide a Uniform Environment Within Which Market Factors May Operate

Whenever Congress has manifested a desire to impose uniform nationwide rules governing significant economic behavior, this Court has given full scope to Congress' decision to displace state standards that threaten to introduce economic distortions into the uniform scheme.

For example, in the cases charting the preemptive effect of ERISA, culminating in *Ingersoll-Rand Co.* v. *McClendon*, 111 S.Ct. 478 (1990), this Court recognized that Congress wished to establish uniform, nationwide rules governing the administrative cost structure of ERISA pension plans in order to assure that employers would not reflect state cost variations by altering employee benefits and, thus, create unintended market consequences. Accordingly, state rules of law with the capacity to alter the administrative cost structure of an ERISA plan have been deemed preempted, even when they are explicitly designed to assist employees in enjoying the plans. Eg. *Ingersoll-Rand Co.* v. *McClendon*, *supra*; *FMC* v. *Holliday*, 111 S.Ct. 403 (1990); *Mackey* v. *Lanier Collection Agency & Service Inc.*, 486 U.S. 825 (1988).

Even in the absence of a broad express preemption provision, such as the provision present in this statute and in ERISA, this Court has carefully preserved Congress' decision to establish uniform national standards governing particular economic activity by preempting state rules that threaten to introduce non-uniform legal duties. Thus, in *Chicago & North Western Transp. Co.* v. *Kalo Brick & Tile Co.*, 450 U.S. 311 (1981), this Court recognized that Congress intended to establish uniform nationwide standards governing abandonment of rail lines by interstate carriers. Accordingly, the Court ruled that Congress had preempted Iowa's common law cause of action for damages for wrongful abandonment. See also *Motor Coach Employees* v. *Lockridge*, 403 U.S. 274 (1971).

Similarly, in *Fidelity Federal Savings & Loan Ass'n* v. *de la Cuesta*, 458 U.S. 141 (1982), this Court recognized that Congress' desire to assure uniform market conditions affecting savings and loan associations preempted California's attempt to restrict due-on-sale clauses in California mortgages.

Most dramatically, in *Machinists* v. *Wisconsin Employment Relations Comm'n*, 427 U.S. 132 (1976) and *Golden State Transit Corp.* v. *Los Angeles*, 475 U.S. 608 (1986), this Court held that Congress' desire to leave an area "to be controlled by the free play of economic forces" acted to preempt state laws that artificially distorted those market forces.

In this case, the driving force behind Congress' enactment of the Airline Deregulation Act of 1978 was its desire to permit air fares to be "controlled by the free play of economic forces". Since those "forces" cannot operate without robust

price competition, and since robust price competition depends upon the existence of sensible, uniform national rules governing the advertising process, the reading of the statute by the Fifth Circuit in *Trans World Airlines* v. *Mattox*, 897 F.2d 773 (5th Cir.), *cert. denied*, 111 S.Ct. 308 (1990) and by the DOT as preempting state efforts to control the form and content of airline rate advertising is consistent the statute's literal text, its context and with settled Congressional practice.

CONCLUSION

For the above-stated reasons, the decision of the court below should be affirmed.

Dated: New York, New York
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No. 90-1604

FILED
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

DAN MORALES,
ATTORNEY GENERAL OF TEXAS,

Petitioner,

—v.—

TRANS WORLD AIRLINES, INC., *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF THE AMERICAN ASSOCIATION OF ADVERTISING AGENCIES, INC., THE NATIONAL ASSOCIATION OF BROADCASTERS AND THE AMERICAN ADVERTISING FEDERATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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No. 90-1604

In The
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

DAN MORALES,
ATTORNEY GENERAL OF TEXAS,

Petitioner,

v.

TRANS WORLD AIRLINES, INC., et al.,

Respondents.

In accordance with Rule 37 of the Rules of this Court, and with consent of the parties, the American Association of Advertising Agencies, Inc. (the "AAAA"), the National Association of Broadcasters (the "NAB") and the American Advertising Federation (the "AAF") submit this brief as amici curiae urging that the judgment of the United States Court of Appeals for the Fifth Circuit be affirmed insofar as it

upheld a permanent injunction to prohibit the Attorney General of Texas from initiating an enforcement action under state law against airline fare advertising.

INTERESTS OF AMICI CURIAE

Together, amici herein -- the AAAA, the NAB and the AAF -- represent thousands of advertising agencies, publishers, broadcasters, advertisers and others who participate in the advertising industry. It is from this broad-based, national perspective that the amici present their views to this Court.

The AAAA is the national trade association of the advertising agency business, representing approximately 750 advertising agencies located throughout the United States. Members of the AAAA

create virtually all national advertising placed by advertising agencies, as well as significant portions of local and regional advertising. Most clients of AAAA members are businesses selling goods or services to the public, with all the major national airlines among them.

The NAB, organized in 1922, is a non-profit incorporated trade association that serves and represents America's radio and television stations and all of the major networks. A substantial amount of the programming and advertising broadcast by NAB members is national in scope and crosses state jurisdictions. In fact, because of the nature of the electromagnetic spectrum, individual station transmissions of local and national programs and

advertising cannot be confined within state boundaries.

The AAF, another national trade association, represents virtually all elements of the advertising industry. Among the AAF's members are companies that produce and advertise consumer products, advertising agencies, magazine and newspaper publishers, radio and television broadcasters, outdoor advertising organizations and other media. AAF members also include twenty-one national trade associations, over two hundred local advertising clubs, with 52,000 members, and over two hundred college chapters, with 6,000 student members. AAF members use virtually all forms of media to advertise and communicate with consumers throughout the United States.

Collectively, amici and their members are experts in communicating with the public at large. Ad agencies, for example, focus their respective professional skills -- creative, marketing, media and otherwise -- to achieve a maximum advertising impact in a cost-efficient manner. It is the job of an ad agency to induce sales of a product by devising a simple selling message that effectively and memorably presents salient information, by fashioning advertisements that will capture and focus consumer attention on that message, and by placing the advertisements in media that will efficiently reach the desired audiences. Likewise, producers and advertisers of consumer products rely on such effective advertising to compete in interstate

commerce. Broadcasters, publishers and other media rely heavily on the revenue generated by such advertising activity to provide news and information to their communities. Amici and their members therefore have a direct and continuing interest in regulatory initiatives that threaten the rights of advertisers and their agencies to communicate fully with the public.

This litigation is an outgrowth of an effort by the attorneys general of five states (Texas, California, Massachusetts, New York and Washington) to impose specialized restraints on advertising by national airlines. The initiative of those attorneys general stands in stark contrast to the acquiescence of other state attorneys general not parties to

the instant action and the contrary interpretation of the U.S. Department of Transportation, the federal agency explicitly authorized by Congress to oversee the airlines' rates, routes and services. The enforcement initiative of the five attorneys general had threatened a situation whereby national advertising messages either approved or left unchallenged by authorities in other states and by the federal government would be banned within the territories of five states.

Amici and their members are best situated to explain the practical difficulties of such a selective prohibition on the flow of national commercial speech. Advertisers, agencies and members of the media know first-hand how commercial speech is

unduly burdened when it must comply with overlapping and conflicting governmental rules. Members of amici thus have a direct and continuing interest in maintaining channels of commercial speech unclogged by governmental impediments that affect the right of advertisers to provide -- and the public to receive -- information regarding the prices of products and services.

SUMMARY OF ARGUMENT

Under the aegis of Texas law, Petitioner attempted to regulate interstate airline fare advertising in a manner that conflicts directly with federal law governing such advertising. The Fifth Circuit correctly held that Section 105 of the Airline Deregulation Act, 49 U.S.C.app. § 1305(a)(1),

preempts Petitioner's enforcement initiative.

It would be impossible for airlines -- and the agencies and media that create and disseminate their advertising -- to comply with the patchwork of state and federal regulations that would result from reversal of the Fifth Circuit. Given the multistate nature of national media, advertisers and their agencies would likely abandon a form of airfare advertising permissible under federal law and explicitly endorsed by the U.S. Department of Transportation rather than attempt to comply with burdensome and contradictory state regulations.

Confronted with such a conflict, and with the clear intent of Congress to exclude states from

regulation of that which "relates to" airfares, the rulings of this Court teach that federal law preempts Texas' attempt to regulate fare advertising. Furthermore, the "balkanization" of regulation and subsequent demise of fare advertising that would occur if the Texas enforcement effort stands would contravene the intent of Congress to create a commercial aviation industry based on robust competition.

ARGUMENT

I. IT IS IMPOSSIBLE TO HARMONIZE FEDERAL POLICY ON AIRLINE FARE ADVERTISING AND THE ENFORCEMENT INITIATIVE OF THE TEXAS ATTORNEY GENERAL.

Petitioner takes great pains to obscure one of the fundamental truths at the heart of the instant litigation. While Petitioner would have this Court

believe that "[t]he effect of the Texas law is the same as that of the FAA's anti-deception standard, and is on all fours with existing federal regulation," (Pet. Br. at 11), the reality is exactly the opposite.[1] As applied to airline

[1] In like manner, the brief amici curiae filed herein by thirty-one state attorneys general asserts that "[t]here simply is no conflict between federal law, valid federal regulations and state law." (Br. Am. Cur. at 22-26.) But to support that proposition the attorneys general are reduced to semantic acrobatics as to what is, and what is not, valid "law." The fact -- unalterable even if unpalatable to the attorneys general -- is that the federal Department of Transportation has approved the very manner of advertising that Texas and a handful of other states would declare unlawful. To deny that this set of facts presents a "conflict" is to run from reality; it is precisely such conflicts that the Supremacy Clause of the United States Constitution (Article VI) is intended to address.

advertising, Petitioner's interpretation of the Texas Deceptive Trade Practices Act, Tex. Bus. & Com. Code § 17.46(a), stands completely at odds with the analogous federal anti-deception standard, Section 411(a) of the Federal Aviation Act (the "FAA"), 49 U.S.C.app. § 1381(a), as the U.S. Department of Transportation (the "DOT") has applied that standard. Were it not for the injunction entered below, Texas and a handful of other states would prohibit airline fare advertising specifically authorized by the DOT's interpretation of the FAA. Trans World Airlines, Inc. v. Mattox, 897 F.2d 773 (5th Cir.), cert. denied, 111 S.Ct. 307 (1990).

Petitioner concedes that the DOT interprets Section 411(a) of the FAA to allow "unbundled" fare advertising --

that is, advertising in which the "base fare" for an airline ticket is noted apart from applicable taxes and other government approved surcharges. (Pet. Br. at 26-27.) Indeed, the DOT has formally proposed a regulation that would allow "unbundled" fare advertising.[2] The DOT's proposed rule would permit exactly that which petitioner would prohibit: it would allow airlines to separate base fares from departure taxes, security charges, and other government imposed or approved add-ons to the base fare.[3]

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2 54 Fed. Reg. 31,052 (July 26, 1989) (notice of proposed rulemaking). To date, these rules have not been published as final by the DOT. See 56 Fed. Reg. 53,614, 53,618 (October 21, 1991).

3 54 Fed. Reg. at 31,055 (proposed 14 C.F.R. §399.84).

While Petitioner concedes the above, however, he also contends that the DOT's policy somehow harmonizes with his interpretation of Texas law, claiming that Texas would merely "impose liability over and above federal law." (Pet. Br. at 27.) Ultimately, Petitioner's contentions collapse under their own weight insofar as they claim to enforce Texas law in a manner contrary to federal policy and in a manner consistent with that same policy.

In his effort to satisfy the needs of two masters, Petitioner apparently confuses the words of a statute with their manner of application. While it may be true that Section 411(a) of the FAA features language similar to that of the Texas

Deceptive Trade Practices Act,[4] it is beyond question that the DOT -- the federal agency charged with enforcement of Section 411(a) -- subjects that language to a completely different interpretation. In its introduction to the proposed rule, the DOT addressed its duty to safeguard consumers from deceptive airline advertising under Section 411(a):

> [T]he Department does not consider such ads [featuring "unbundled"

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[4] Compare 49 U.S.C.app. § 1381(a) ("If the Board shall find . . . that such air carrier . . . is engaged in such unfair or deceptive practices or unfair methods of competition, it shall order such air carrier . . . to cease and desist from such practices or methods of competition.") with Tex. Bus. & Com. Code § 17.46(a) (declaring unlawful "[f]alse, misleading, or deceptive acts or practices in the conduct of any trade or commerce").

fare information] to be unfair or deceptive provided they are clear and the total amount to be paid by the consumer can be calculated easily by adding the separately-stated fixed amounts. . . .

Under section 411, the Department is responsible for protecting aviation consumers from unfair and deceptive trade practices. These changes are intended to implement that authority fully and clearly and without placing any restrictions on the industry that are not necessary and that would tend to limit airline price competition.

54 Fed. Reg. at 31,053. It seems evident, then, that the DOT has considered the effects of Section 411(a) in its approval of the form of fare advertising rejected by Petitioner herein. See generally Alaska v. United States Dep't of Transp., 868 F.2d 441, 442-43 (D.C. Cir. 1989) (describing DOT's attempt to approve separate

advertising of "base fare" and add-ons through DOT "Exemption Orders").

No two interpretations could differ more, and Petitioner therefore errs when he concludes that "Texas law and federal law and regulation remain in twain." (Pet. Br. at 27.) The stark contrast between federal regulatory policy and state "law" is all too evident. The DOT interprets the federal anti-deception statute to allow "unbundled" fare advertising, while the Texas Attorney General reads a similar Texas law to prohibit such advertising. The fact that Petitioner concedes the existence of this Hobson's choice shatters any notion of congruence between the federal policy and the Texas enforcement effort. It is in light of such a choice that this Court must

address the issue of whether federal law preempts the efforts of Texas to enforce what amici submit are needlessly restrictive policies concerning fare advertising.

II. THE STARK CHOICE CREATED BY THE TEXAS ATTORNEY GENERAL LEADS TO A COMMERCIALLY UNTENABLE SITUATION FOR THOSE WHO CREATE AND PLACE FARE ADVERTISING.

Paralleling the legal conflict between the policies of DOT and the Texas Attorney General is the practical conflict that results from overlapping and inconsistent regulatory standards. By its very nature, advertising placed in national media, such as national television broadcasts or magazines and newspapers having a national circulation, is disseminated throughout the country. As a practical matter, it

is often nearly impossible for an advertiser to pick and choose which states will, or will not, receive the advertisement.

In the case of broadcast advertising, for example, a national television or radio network can block transmission of its "feed" during particular advertising times to identified local stations. Such breaks in national transmission, however, are rare and especially costly during peak viewing periods. Moreover, breaks in transmission cannot possibly be made to correspond to particular state boundaries, for local radio and television broadcasts are designed to cover metropolitan areas, not state borders.

For example, the Texarkana market extends to cover not only Texarkana, Texas, but also Shreveport, Louisiana, and Marshall, Texas. Similarly, the El Paso, Texas broadcast area encompasses Las Crueces, New Mexico. Wichita Falls, Texas is in the same broadcast area as Lawton, Oklahoma. The Arbitron Company, Television Universe Estimates Summary 9-31 (1991).

Such overlapping of broadcast areas is even more widespread among the smaller states along the East Coast. New York City's broadcast stations cover portions of Connecticut and New Jersey as well as parts of New York State. Boston, Massachusetts, stations regularly broadcast into Maine and New Hampshire. Washington, D.C., residents receive broadcast signals from stations

located in both Virginia and Maryland. Id. The existence of nationwide cable telecasts such as those from the Turner Broadcasting Corporation's "Superstation" in Atlanta compound the severity of a particular state attorney general's decision to prohibit airline fare advertising that has been authorized by the DOT.

The difficulties inherent in the broadcast media exist as well with regard to national print media. Some national magazines are able to offer advertisers and agencies a series of "regional" editions that permit an advertiser to "customize" an advertising program to various regions of the nation. But no major national magazine has a program that would permit a break-down on a state-by-state basis.

These difficulties point up the wisdom inherent in the teaching of this Court that, even where Congress has not entirely displaced state regulation in a particular field, state law is preempted when its application conflicts with federal law. Here, for national airline advertising, it is impossible to comply with both state and federal law, creating precisely the sort of conflict that should give rise to federal preemption. "A holding of federal exclusion of state law is inescapable . . . where compliance with both federal and state regulations is a physical impossibility for one engaged in interstate commerce . . . ." Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (1963) (citations omitted). Accord, California Coastal

Comm'n v. Granite Rock Co., 480 U.S. 572 (1987); Hines v. Davidowitz, 312 U.S. 52 (1941).

III. CONGRESS EXPLICITLY PREEMPTED STATE REGULATION OF AIRFARE ADVERTISING BECAUSE IT "RELATES TO" AIRLINE FARES.

When Congress enacted the Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 (1978), it intended the statute to encourage and develop an air transportation system that relied on competitive market forces "to determine the variety, quality, and price of air transportation services." 92 Stat. at 1707 (§ 102(a)(9)). The Deregulation Act did not modify Section 411(a) of the Federal Aviation Act, and the DOT has since assumed the responsibility of preventing "unfair or

deceptive practices in . . . the sale" of air transportation services.

The Deregulation Act added, in Section 105, a provision to preempt any state or political subdivision from "enforc[ing] any law, rule, regulation, standard, or other provision . . . relating to rates, routes, or services of any air carrier." 49 U.S.C.app. § 1305(a)(1). The House Committee on Public Works and Transportation noted that the section was intended to "prevent conflicts and inconsistent regulations by providing that when a carrier operates under [federal] authority . . . no State may regulate that carrier's routes, rates or services." H.R. Rep. No. 1211, 95th Cong., 2d Sess. 16, reprinted in 1978 U.S.C.C.A.N. 3737, 3752.

Section 105 by its explicit terms applies to all state enforcement efforts "relating to rates" of airlines, and advertising of fares by airlines clearly "relates" to rates. Regulation of fare advertising directly implicates the setting of rates because vigorous fare advertising both reflects, and contributes to, the movement of fares in free competition. Congress, by using the broad phrase "relating to," indicated its intention to preempt with the plain meaning of that functional phrase. See Shaw v. Delta Air Lines, 463 U.S. 85, 95-100 (1983); see also Ingersoll-Rand Co. v. McClendon, 111 S.Ct. 478 (1990); FMC Corp. v. Holliday, 111 S.Ct. 403 (1990); International Ass'n of Machinists & Aerospace Workers

v. Wisconsin Employment Relations Comm'n, 427 U.S. 132 (1976).

The court below rested its interpretation of Congress' plain words on the guidance of this Court in Shaw v. Delta Air Lines, 463 U.S. 85 (1983). In Shaw, presented with an analogous question of legislative intent, this Court concluded that Congress did not intend to vary the ordinary meaning of the phrase "relates to," which means having "a connection with or reference to." Id. at 96-97. There is nothing in the legislative record of the Airline Deregulation Act to suggest anything to the contrary here. Indeed, enforcement of a state law regulating fare advertising by airlines clearly contravenes the practical intent of Congress regarding the meaning and scope

of Section 105. "Section [105] ensures that the prices at which [airline ticket] sales occur to consumers, and the accompanying advertising, can proceed under a legal standard uniform nationwide." Illinois Corporate Travel, Inc. v. American Airlines, 889 F.2d 751, 754-55 (7th Cir. 1989), cert. denied, 110 S.Ct. 1948 (1990).

Any doubt regarding the reach of Section 105 should be dispelled by the interpretation of the provision given by the DOT, the agency authorized to implement Congress' intentions in this area. In letters to the attorneys general, and more recently in proposed rules and a rulemaking proceeding, DOT has made clear its position that state regulation of airline fare advertising is preempted. See Alaska v. United

States Dep't of Transp., 868 F.2d 441, 442-43 (D.C. Cir. 1989) ("DOT warned the States that 'the Federal government has preempted this aspect of state advertising regulation'. . . ."); 54 Fed. Reg. 31,052, 31,053-54 (July 26, 1989) ("In particular areas the states' ability to enforce advertising rules and policies has been preempted by the DOT rules. For example, states would be preempted from regulating airline advertising of fares and schedules since DOT has specific rules covering deceptive practices in these areas."). This reading of Section 105 by the DOT, a permissible construction of the statute, should go far to eliminate any ambiguity. Hillsborough County v. Automated Medical Labs., Inc., 471 U.S. 707, 714-15 (1985); Capital Cities

Cable, Inc. v. Crisp, 467 U.S. 691, 698-705 (1984); see Chevron U.S.A. v. Natural Resources Defense Council, 467 U.S. 837, 843 (1984).

IV. "BALKANIZED" REGULATION OF AIRFARE ADVERTISING WILL CONTRAVENE THE INTENT OF CONGRESS BECAUSE IT WILL STIFLE AIRFARE ADVERTISING ALTOGETHER.

Petitioner asserts that enforcement of state consumer protection statutes against airline fare advertisements will make the "marketplace function better by making it function honestly." (Pet. Br. at 11.) Such "good guys vs. bad guys" oratory, however, is inconsistent with the facts of price advertising, whether for airline services or for any other goods or services.

Advertising's purpose is to draw the consumer's favorable attention to a particular product, service, or brand. Its intention is to capture a consumer's brief attention span, to engage his or her interest for the short time available in the ever-increasing clutter on virtually every medium. As the first step in the buying process, advertising supplies the consumer with basic, introductory information about the availability of a product, its primary functions, and its advantages.

Typically, ads do not attempt to provide a comprehensive recitation of information potentially relevant to a purchasing decision. Instead, they merely seek to generate initial consumer

interest in the product.[5] The consumer may then go to other points of access, including point-of-sale promotional materials and reservations clerks, and may make a final purchase decision appropriately.

In fact, a multiplicity of conflicting legal rules, both state and federal, covering airfare advertising can only create confusion and higher costs for advertisers and consumers

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5 Consumers neither expect nor desire advertisements to supply all of the information that they conceivably might need to decide ultimately whether to purchase the product. This is especially so when, as in the case of airline tickets, advertising is only an initial step in a process that <u>requires</u> interaction with sales personnel such as a travel agent.

alike.[6] Whenever regulators attempt to dictate the quantity and manner of specific information that must be included in advertisements, creative flexibility is restricted and advertising effectiveness is lessened.

When rate information such as savings, special values, and competitive fares is subject to a patchwork of differing state interpretations because in various states it is considered "incomplete" or 'misleading," price

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6 Significantly, the airline advertising guidelines issued in 1987 by the National Association of Attorneys General ("NAAG") include numerous detailed disclosure requirements in addition to those directly presented in this action. Petitioner recognizes that in adopting the guidelines the various attorneys general retained "individual prosecutorial discretion" for "variations in individual state and common law." (Pet. Br. at 6.)

competition is actually undermined. The airline and its advertising agency, discouraged by the extra costs inherent in advertising lower prices or unable to fashion an effective message in the face of a patchwork of onerous constraints, must turn away from fare advertising to compete on a different level. As the burdens of fare advertising increase, advertisers inevitably shy away from that type of advertising, so that price competition decreases.[7]

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7 There is some evidence that precisely such a shying away has taken place in airline advertising. For example, the managing director of advertising for an airline that is not a party to this litigation was quoted in 1989 as stating that "[t]he industry got away from a lot of price advertising because of the [NAAG] Guidelines . . . that probably made the industry stop fare advertising on a large scale." Airlines Win First NAAG Bout, Advertising Age, February 6, 1989, at 8.

This dilution of price competition in airfare advertising is clearly not what Congress intended. As Petitioner concedes, (Pet. Br. at 13), the "primary motivation" of Congress in enacting the Airline Deregulation Act was to eliminate many of the anticompetitive federal regulations governing airlines. By deregulating, Congress hoped to encourage competition among airlines and thereby to bring ticket prices down. To permit duplicative and inconsistent state regulation of airfare advertising would decrease that competition and, contrary to Congress' intent, halt the lowering of airfares that can result from vigorous airfare advertising. Ultimately, such a result disrupts

competition and increases costs for marketers and consumers alike.

CONCLUSION

For the reasons set forth above, the AAAA, the NAB and the AAF respectfully request that the judgment of the United States Court of Appeals for the Fifth Circuit be affirmed.

Dated: New York, New York
February 11, 1992

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

DAN MORALES, ATTORNEY GENERAL OF TEXAS,
Petitioner,

v.

TRANS WORLD AIRLINES, INC., *et al.*,
Respondents.

BRIEF OF AMERICAN AIRLINES, INC. AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

90-1604

DAN MORALES, ATTORNEY GENERAL OF TEXAS,
Petitioner,

v.

TRANS WORLD AIRLINES, INC., *et al.*,
Respondents.

BRIEF OF AMERICAN AIRLINES, INC. AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

STATEMENT OF INTEREST

Amicus curiae American Airlines, Inc. ("American") files this brief because of its strong interest in the subject of this case, and because of its ability to provide information that will be useful to the Court in reaching a just and correct decision.[1]

This case involves the attempt by a group of state attorneys general to regulate the advertising of airline fares under state laws prohibiting deceptive advertising. The Fifth Circuit correctly held that state reg-

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[1] Pursuant to Rule 37.3 of the Rules of this Court, this brief is filed with the consent of Petitioner and of Respondents. Letters of consent from all parties are being filed concurrently with this brief.

ulation of the advertising of airline fares was pre-empted by Section 105(a)(1) of the Airline Deregulation Act of 1978, 49 U.S.C. App. § 1305(a)(1). This Court has agreed to review that decision in response to a Petition for a Writ of Certiorari filed by the Attorney General of Texas.

American has a special interest in this issue because:

(1) American is the largest domestic airline and one of the largest airlines in the world, doing business in all 50 states and many foreign countries. If the states are permitted to "re-regulate" the airline industry, American will be one of the airlines most directly affected.

(2) American spends in excess of $100 million dollars each year to advertise and promote its services in the U.S., with much of that directed to the advertisement of airline fares.

(3) American is a Texas-based corporation, with its largest hub operation at Dallas/Fort Worth Airport, and with operations throughout Texas. Thus, the actions of the Attorney General of the State of Texas regarding the applicability of Texas state law to airline advertising will have a significant and direct impact on American.

(4) American has litigated the issue of pre-emption under the Airline Deregulation Act before many courts, and is very familiar with the applicable cases, statutes and principles. For example, American argued this issue successfully before the Seventh Circuit in *Illinois Corporate Travel, Inc. v. American Airlines, Inc.*, 889 F.2d 751 (7th Cir. 1989). This Court

denied certiorari in *Illinois Corporate Travel*. *See* ___ U.S. ___, 110 S.Ct. 1948 (1990).

(5) American has been a leader in introducing heavily discounted, but restricted fares. American was the first to introduce the now familiar "Super Saver" fares that are used by so many travelers. American continues to be an innovator in this area, and owes much of its competitive success to its farsighted approach in this area. The use of such fares, and the benefits they provide to travelers, are threatened by the actions of the state attorneys general.

(6) American's advertising has not been the target of any enforcement action by the state attorneys general. Thus, American's concerns regarding this case are broader than the specific advertising practices used by other airlines that are in dispute, and American can direct the Court to these broader concerns.

For these reasons, American respectfully submits this Brief *Amicus Curiae* in support of Respondents and in favor of affirming the decision of the Fifth Circuit.

SUMMARY OF ARGUMENT

American agrees with Respondents that the plain meaning of the "relating to" language of Section 105(a)(1) pre-empts state laws that have "a connection with" routes, rates, or services, even if that connection is indirect. The language of the statute, its legislative history, the interpretation given to that language by the agencies charged with its enforcement, and this Court's prior decisions interpreting essentially the same words in a different statute enacted by Congress at about the same time, all support

Respondents' position and argue in favor of the affirmance of the Fifth Circuit's decision.[2]

However, this case can be decided in favor of Respondents, and consistent with the decision of the court below, on a much narrower ground. It is conceded by Petitioner, as it must be, that direct state regulation of airline fares would "relate to" routes, rates or services within the meaning of Section 105(a)(1). But there can be little doubt that the regulation of airfare advertising by fifty state attorneys general and countless state court judges will inevitably lead to a reduction in advertising and a decline

[2] The Fifth Circuit's decision is consistent with the decision of the only other Circuit that has addressed the same issue. In *Illinois Corporate Travel, Inc. v. American Airlines, Inc.*, 889 F.2d 751, 754 (7th Cir. 1989), *cert. denied*, ___ U.S. ___, 110 S.Ct. 1948 (1990), the Seventh Circuit concluded that "[p]rice advertising surely 'relates to' price," and any attempt to use state law to void restrictions imposed on a travel agent by an airline regarding the advertising of fares was pre-empted by Section 105. *See also New England Legal Foundation v. Massachusetts Port Authority*, 883 F.2d 157, 173 (1st Cir. 1989); *O'Carroll v. American Airlines, Inc.*, 863 F.2d 11, 13 (5th Cir.)(per curiam), *cert. denied*, 490 U.S. 1106 (1989); *Anderson v. USAir, Inc.*, 818 F.2d 49, 57 (D.C. Cir. 1987). The Ninth Circuit's decision in *West v. Northwest Airlines, Inc.*, 923 F.2d 657 (9th Cir. 1990), *petition for cert. pending, No. 91-505*, which is relied upon heavily by Petitioner, relates to overbooking and not fares and, in any event, is wrongly decided. Other panels in the Ninth Circuit do not appear to follow it. *See, e.g., Federal Express Corp. v. California Public Utilities Comm'n*, 936 F.2d 1075 (1991), *petition for cert. pending, No. 91-502*. Moreover, *West* is not consistent with earlier Ninth Circuit decisions. *See Air Transport Ass'n of America v. Public Utilities Commission*, 833 F.2d 200, 207 (9th Cir. 1987), *cert. denied*, 487 U.S. 1236 (1988); *Hingson v. Pacific Southwest Airlines*, 743 F.2d 1408, 1415 (9th Cir. 1984).

in airline fare competition. Such regulation would increase the cost of introducing, implementing and promoting discount fares, would slow or make impossible the ability to introduce new fares as a competitive response to price initiatives implemented by other airlines, and would result in fewer discount fares and higher prices. Thus, the regulation of airline fare advertising is, in practical effect, the *direct* regulation of the fares that airlines can charge, and therefore any attempt by the states to regulate airline fare advertising is clearly pre-empted by the express language of Section 105(a)(1).

Regulating what an airline can say about its rates will have a direct impact on the underlying rates themselves. In 1989,the Department of Transportation ("DOT") made clear its view that regulation of airline price advertising by the states would "significantly affect airline rates, routes and services." *See* Notice of Proposed Rulemaking, 54 Fed. Reg. 31,054 (1989). It was the expert opinion of the DOT that state regulation of airline price advertising "would tend to limit airline price competition," and would make it "virtually impossible to put together nationwide advertising programs," with the result that "[p]rice competition would suffer, thus depriving consumers of lower fares." *Id.*, 54 Fed. Reg. 31,053, 31,054. In opposing certiorari in this case, the United States similarly stated that "there is a direct, immediate, and strong relationship between advertising and price." Brief for the United States as *Amicus Curiae*, at p. 9. The Seventh Circuit, in a similar case decided consistently with this case, observed that "to forbid the advertising of discounts is to set price (at least to influence it), a proposition with substantial

support in both law, . . . and economics." *Illinois Corporate Travel, Inc. v. American Airlines, Inc., supra,* 889 F.2d at 755. *C.f.,* Note, *The Risk of Chill: A Cost of the Standards Governing the Regulation of False Advertising Under Section 43(a) of the Lanham Act,* 77 Va. L. Rev. 339 (1991).

The connection between airline fare advertising and airline fares themselves flows from the competitive realities of the airline industry, as unleashed by Congress through the Airline Deregulation Act. In this brief, American provides the Court with information about the operation of the airline industry and the advertising of airline fares in order to show why regulation of fare advertising would directly affect airline fares in a way that would injure the public and frustrate the intent of Congress as declared in the Airline Deregulation Act.

Since deregulation in 1978, the airlines have competed using pricing that is uniquely suited to the economics of the industry. By offering a series of fares with increasing degrees of restrictions, airlines can maximize their ability to attract discretionary and marginal traffic while maintaining their existing revenue base. The result has been a net decline in the cost of air travel in real dollars for American travelers.

This was exactly what Congress intended when it deregulated the industry. Congress wanted innovative price initiatives and vigorous price competition. It wanted airlines to introduce and promote discounts to the public. To assure this would happen, Congress placed all authority over matters relating to airline rates in the hands of the DOT, instructed that agency to give primary importance to competitive concerns,

and pre-empted any intermeddling in this process by state regulators.

Regulation of airline fare advertising by multiple jurisdictions, some with conflicting policies and requirements, would reverse the benefits that have resulted from deregulation and would frustrate Congress' intent for no reason because, contrary to the charges of the Petitioner, Congress did not create a regulatory void when it barred the states from regulating air fare advertising. Understanding the potential need for government controls, Congress granted such power to the DOT, and the DOT has exercised that power in accord with uniform national policies and regulations.

For these reasons, as set out in more detail below, American urges the Court to affirm the Fifth Circuit and find that the Airline Deregulation Act pre-empts the regulation of airline fare advertising pursuant to state deceptive advertising laws.

ARGUMENT

I. CONGRESS INTENDED TO PRE-EMPT ALL STATE REGULATION THAT WOULD DIRECTLY INTERFERE WITH THE AIRLINE PRICE COMPETITION DEREGULATION WAS TO FOSTER

Section 105 of the Airline Deregulation Act contains an express pre-emption clause. That clause limited the scope of a narrow saving clause found at Section 1106 that had been passed 40 years earlier. In transferring the authority to regulate unfair or deceptive practices in the airline industry under Section 411 to the DOT in 1984, Congress reaffirmed its intent to pre-empt any state regulation relating to airline rates, including the regulation of airline fare

advertising. Without question, any regulation by the states having a direct impact on airline fares was prohibited by Congress.

A. SECTION 105—THE PRE-EMPTION CLAUSE

Section 105 is an express pre-emption clause of broad scope. It prohibits all state regulation "relating to rates, routes, or services of any air carrier." Congress could not have spoken more clearly or more broadly in announcing its intention to pre-empt, at a minimum, all state regulation that has a direct impact on airline fares. This Court has held the words "relate to" in a pre-emption clause are to be interpreted broadly to pre-empt all state law "even if the law is not specifically designed to affect [the pre-empted area], or *the effect is only indirect.*" *Ingersoll-Rand v. McLendon*, ___ U.S. ___, 111 S.Ct. 478, 483(emphasis added). *See also Illinois Corporate Travel, Inc. v. American Airlines, Inc., supra*, 889 F.2d at 754 (phrase "relating to" in Section 105 of the Airline Deregulation Act "substantially increases the extent of preemption").

The fact that Congress placed a pre-emption clause in the Airline Deregulation Act is significant in itself. Prior to deregulation, the states had concurrent jurisdiction over some matters relating to airlines. *See Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290 (1976).[3] The inclusion of a pre-emption clause in the

[3] While *Nader* is heavily relied upon by Petitioner and *Amici* supporting Petitioner, the case has little relevance. It was an *implied* pre-emption case decided before passage of the Airline Deregulation Act. Moreover, the subject matter of the case—overbooking—involved an area where the Civil Aeronautics Board had expressly granted to consumers the right to pursue common law remedies. *See Nader v. Allegheny Airlines, supra*, 426 U.S. at 294-95, 306 n.16, 307 n.18. Even after deregulation and the transfer of authority to the Department of Transportation, this special treatment of overbooking cases continues because of express federal regulations on the subject. *See* 14 C.F.R. §250.9 (giving consumers the option of either accepting denied boarding compensation offered by a carrier or seeking "to recover damages in a court of law or in some other manner.").

Airline Deregulation Act was a dramatic change in that situation.

In adding a pre-emption clause pursuant to Section 105 of the Airline Deregulation Act, Congress used language that is a template of how to phrase a pre-emption clause when full pre-emption is intended. The statute pre-empts all state regulation "relating to" rates. 49 U.S.C. App. §1305(a)(1). In *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85 (1983), *Pilot Life Insurance Company v. Dedeaux*, 481 U.S. 41 (1987), *Metropolitan Life Insurance Company v. Taylor*, 481 U.S. 58 (1987), *FMC Corp. v. Holliday*, ___ U.S. ___, 111 S.Ct. 403 (1990), and *Ingersoll-Rand v. McLendon*, ___ U.S. ___, 111 S.Ct. 478 (1990), this Court interpreted Section 514(a) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. §1144(a), which provides for the pre-emption of state laws that "may now or hereafter *relate to* any employee benefit plan," as a clear expression of Congress' intent to provide for exclusive federal control. In *Ingersoll-Rand*, for example, the "relate to" language of Section 514(a) is described as "conspicuous for its breadth" and "deliberately expansive," and the Court gave the phrase a "broad, common-sense meaning." *Ingersoll-Rand v. McLendon, supra*, 111 S.Ct. at 482-83. Section 105(a)(1) of the Airline Deregulation Act, 49 U.S.C. App. §1305(a)(1), uses almost identical lan-

guage, is part of a comprehensive regulatory scheme, and reflects a choice by Congress of language with a broad pre-emptive effect over less inclusive language.

Amici in support of Petitioner contend that the Court should not give the same words the same meaning when used by Congress in different statutes, and suggest the Court should instead interpret each statute *sui generis* based upon the application of a long list of sweeping principles and "maxims" of statutory construction that are often vague and self-contradictory. Brief of Public Citizen and Aviation Consumer Action Project As *Amici Curiae* Supporting Petitioner ("Brief of *Amici*") at pp. 9-13. Although such rules of statutory construction have their place, they should not be used as a justification for judicial activism and the usurpation of the legislative function by the Courts. If the extreme position of *Amici* is accepted, then no matter what words are used, no one, not even Congress, would know what a statute meant until this Court had a chance to filter the legislation through the many subjective tests contained in these maxims of jurisprudence.[4]

Here, two sweeping statutes passed within four years of each other use essentially identical words in pre-emption clauses aimed at preserving uniform federal regulation. This Court has found the language to

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[4] *Amici* argue that one must use the panoply of legal maxims to "divine congressional intent." Brief of *Amici* at p. 9. Those that promote the overuse of these principles find the language of all legislation to fall short of a "model of clarity," thereby providing fertile ground for judicial reconstruction. This fosters a form of judicial activism that is not consistent with the separation of powers concept embodied in the U.S. Constitution.

be broad and inclusive when used in the first statute. To give those words a different meaning in the second would be wrong. *See Metropolitan Life Insurance Co. v. Taylor*, 481 U.S. 58, 65 (1987) (It is presumed that "similar language in two . . . statutes has a similar meaning"). *See also Chevron U.S.A. Inc. v. Natural Resources Defense Counsel, Inc.*, 467 U.S. 837, 842-43 (1984) ("If the intent of Congress is clear, that is the end of the matter; for the court . . . must give effect to the unambiguously expressed intent of Congress"); *Park 'N Fly, Inc. v. Dollar Park and Fly, Inc.*, 469 U.S. 189, 194 (1985).

Significantly, Congress selected the broad language of Section 105 after rejecting less encompassing language contained in an earlier Senate version of the bill. *See Hingson v. Pacific Southwest Airlines*, 743 F.2d 1408, 1416 n.11 (9th Cir. 1984). *Amici* supporting Petitioner contend that the language of the Senate version of the Airline Deregulation Act demonstrates a Congressional intent to prohibit only "utility-type" regulation of airlines by the states. Brief of *Amici* at pp. 17-18. Indeed, the Senate version limited pre-emption to state regulations "*determining* routes, schedules, or rates, fares, or charges in tariffs." But Congress rejected the Senate version of the bill, and instead inserted much broader language in the final bill, making it clear that more than utility-type regulation of fares was pre-empted. The final version of the statute used the language "relating to" to go beyond utility-type regulation and to prohibit state regulation of any type that might restrict the vigorous price competition Congress intended to unleash with deregulation.

The pre-emption clause found in the Airline Deregulation Act is part of a comprehensive scheme to redirect the U.S. airline industry. To accomplish that goal, Congress gave certain authority to the DOT and provided clear instructions on how that authority was to be exercised.[5] Regarding airline fares and fare advertising, Congress told the DOT to exercise its authority "in the interest of the public," 49 U.S.C. App. §1381(a), and defined the public interest to include "maximum reliance on competitive market forces," 49 U.S.C. App. §1302(a)(4). If the states had concurrent jurisdiction over airline rates, routes and services, they would not be subject to these same directions and Congress' intentions could be thwarted. Congress knew this when it added the broad language of Section 105. *See* H.R.Rep. No. 1211 at 15-16; 1978 U.S. Code Cong. & Admin. News at 3751-52 (pre-emption provision added to "prevent conflicts and inconsistent regulations").

Interpreting Section 105 as Petitioner urges would directly contravene Congressional purpose. The Airline Deregulation Act was specifically intended to eliminate regulatory constraints on price competition that had existed in the past, and to encourage discount fares. *Id.*, at 2-4. Congress prohibited federal regulators from interfering with competitive forces. All of this would have gone for naught if Congress had left the door open for the states to come back

[5] Authority was initially assigned to the Civil Aeronautics Board (the "CAB"). The CAB was eventually disbanded, and all remaining authority was transferred to the DOT. For convenience, this Brief will use "DOT" to refer to both agencies unless the context is such that a distinction is of substantive importance.

in and re-regulate the airlines. *See New England Legal Foundation v. Massachusetts Port Authority*, 883 F.2d 157, 173 (1st Cir. 1989)("Congress obviously did not intend to leave a vacuum to be filled by the Balkanizing forces of state and local regulation.").

Thus, there is ample support for the conclusion that Congress intended to pre-empt any state regulation that had even an indirect effect on airline fares and airline price competition. However, this Court need not determine the outer boundaries of the pre-emption clause to decide this case. At the very least, Congress intended to pre-empt those state laws that have a *direct* impact on airline fares.

B. SECTION 1106—THE SAVING CLAUSE

The original federal statute regulating the airline industry was passed in 1938, and contained a "saving clause" at Section 1106, 49 U.S.C. App. §1506. The provision was limited to those state remedies "now existing." This saving clause remains in effect today, but does not limit the scope of the pre-emption clause passed by Congress in 1978. The effect of the saving clause is to preserve from implicit pre-emption state remedies that do not relate to rates, routes or services.

The pre-emption lause in Section 105 and the saving clause in Section 1106 coexist comfortably. The more recently passed pre-emption clause is directed specifically to the areas of rates, routes and services—the areas where Congress wanted to stimulate competition under uniform policies implemented by the DOT. As other courts have also concluded, the saving clause preserves state remedies from implicit pre-emption, but not from express pre-emption. *See Illi-*

nois Corporate Travel, Inc. v. American Airlines, Inc., *supra*, 889 F.2d at 754; *O'Carroll v. American Airlines, Inc.*, 863 F.2d 11, 13 (5th Cir.)(per curiam), *cert. denied*, 490 U.S. 1106 (1989); *Hingson v. Pacific Southwest Airlines*, 743 F.2d 1408, 1416 n.11 (9th Cir. 1984).[6]

Clearly, the pre-emption clause added in 1978—40 years after the saving clause—must be given priority over the saving clause. To argue the contrary would suggest that a statutory provision of general language, inserted at the end of a statute as a "catch all" provision, should take precedence over a substantive provision contained in the body of the statute and expressly directed to the heart of the deregulation legislation. This saving clause, like all saving clauses, must be read as secondary to, and limited by, the express actions of Congress in the body of the legislation. *See International Paper Co. v. Ouellette*, 479 U.S. 481, 494 (1987) ("we do not believe Congress intended to undermine this carefully drawn statute through a general saving clause"); *Busic v. United States*, 446 U.S. 398, 406 (1980)(a specific statute controls over a general enactment). *See also Metropolitan Life Insurance Co. v. Massachusetts*, 471 U.S. 714, 740 (1985) ("While Congress occasionally

[6] American does not contend that all state laws that might conceivably have a relationship with the airline industry are pre-empted. *Amici* in Support of Petitioner list a "parade of horribles" suggesting that state laws relating to everything from air crashes to spilled coffee will be pre-empted under the theory put forward by Respondents. Brief of *Amici* at pp. 9-10. This overstates the position taken by Respondents. In any event, it totally misses the mark when considered in light of the narrower pre-emption analysis suggested here.

decides to return to the States what it has previously taken away, it does not normally do both at the same time.").

Even if the saving clause acted as a limitation on Congress' intent as expressed in the pre-emption clause, it would not preserve any claims under the Texas statute at issue in this case. The saving clause enacted in 1938 had a narrow focus. It only preserved those remedies "now existing at common law or by statute." The Texas statute was not in existence in 1938, and would not have been saved.[7]

Ultimately, however, this case can be decided on a more narrow ground. There can be no doubt, as discussed above, that the pre-emption language of Section 105 expressly pre-empts state regulation that *directly* affects fares. While the saving clause might preserve other state remedies in other areas, no rational reading would permit a construction whereby the saving clause would directly contradict the pre-emption clause.

C. SECTION 411—UNFAIR OR DECEPTIVE PRACTICES

In 1984 Congress transferred the power to control unfair or deceptive trade practices in the airline industry from the Civil Aeronautics Board (which was being disbanded) to the DOT. In doing so, Congress did not intend to permit any regulation of the competitive process that would deny the public the full

[7] Not only was the Texas statute in question not in existence at the time the saving clause was enacted, but neither were any of the deceptive advertising statutes of the 31 other states that have supported Texas in this action as *amici*, at least as those statutes are currently constituted. Thus, none of these states can rely upon the saving clause.

benefits of competition in the airline industry. It had instructed the DOT to give "maximum reliance on competitive market forces," 49 U.S.C. App. §1302(a)(4). At the time of the transfer of authority to the DOT, Congress again repeated its intention to provide uniform federal regulation without interference by the states. *See* H.R. Rep. No. 793 at 4; 1984 U.S. Code Cong. & Admin. News at 2860 ("federal regulation insures a uniform system of regulation and pre-empts regulation by the states").

Nothing connected with the transfer of authority under Section 411 from the CAB to the DOT suggests that the pre-emption clause in Section 105 was intended to be read narrowly. Indeed, the opposite is true.

II. THE APPLICATION OF STATE LAWS AND REGULATIONS TO AIRLINE FARE ADVERTISING WOULD HAVE A DIRECT AND SIGNIFICANT IMPACT ON AIRLINE FARES BECAUSE IT WOULD UNNECESSARILY REDUCE THE AMOUNT OF PRICE INFORMATION MADE AVAILABLE TO CONSUMERS, REDUCE THE NUMBER AND TYPE OF DISCOUNT FARES OFFERED BY AIRLINES, AND REDUCE PRICE COMPETITION IN THE AIRLINE INDUSTRY

As Judge Easterbrook wrote for the Seventh Circuit, "price advertising surely 'relates to' price," and the regulation of airline fare advertising "relates to" airline fares in the most direct sense. *See Illinois Corporate Travel, Inc. v. American Airlines, Inc., supra,* 889 F.2d at 754-55. *See also* discussion at pages 5-6, *infra,* and authorities cited there. The airline industry offers a large number of different fares characterized by increasing degrees of restrictions. These fares are introduced quickly in response to competitive moves in the marketplace, and are promoted nationally. Overall, this fare environment has benefited consumers. The micro-management by the states of the advertising of fares would not only restrict the amount of information available to the public about fares (thereby reducing their functional availability), but would result in the elimination of certain fares.

A. INNOVATIVE ATTEMPTS BY AIRLINES TO COMPETE ON PRICE IN A DEREGULATED ENVIRONMENT ARE OFTEN NECESSARILY COMPLEX

The many fares used by the airline industry are not the result of happenstance. They reflect a special economic environment influenced by the following three factors, among others:

(1) Airlines have high fixed costs associated with operating a complex, interconnected network of scheduled flights. Major cost categories include aircraft and fuel, flight crews and ground personnel, airport terminals and maintenance facilities, and marketing, management and capital costs.

(2) Once a decision has been made to provide a flight between two cities, the marginal cost of adding one more passenger to that flight (assuming there is an available seat and therefore no need to add a new or larger aircraft) is small. Industry load factors (*i.e.*, the percentage of seats filled) generally average around 60 to 65%.

Facing high fixed costs and low marginal costs, airlines establish their basic fares in the hope of attracting enough passengers to cover their fixed costs, including a reasonable return on their investment. Having done that, airlines can then consider if it is possible to attract additional passengers by offering

them lower fares, while still retaining the revenue base needed to cover their fixed costs. The solution has been to offer lower fares that are restricted. *See generally,* J.P. Schwieterman, *Fare is Fair in Airline Deregulation: Restrictions and the Pursuit of Allocative Efficiency,* Regulation (Summer 1991), at pp. 29 *et seq.*

Restricted fares reflect the fact that airline service can be separated into different "products" that can be sold to different people at different prices. Thus, the person who wants the ability to travel at any time, on any flight can purchase an unrestricted ticket. However,the passenger who wants to pay the least amount possible, but is willing to book in advance, travel only at certain times, and accept other limitations, can purchase a restricted discount ticket. The offering of a lower, restricted fare does not fully dilute the revenues that would be earned from the higher, unrestricted fare, because those travelers paying the higher price want to purchase an airline "product" that is different and presumably worth more in their eyes.

The use of restrictions in association with discounted fares is critical. If the discounted fares were offered on the same terms as the full fares, then no one would ever purchase a full fare ticket and the airline's revenue base needed to cover its fixed costs would erode. Accordingly, as airlines reduce the fares for seats on a particular flight, they must impose additional restrictions in order to make those fares unattractive to passengers who would otherwise pay a higher fare. Each further reduction in fare for a seat on a particular flight must bring an increased

restriction in order to function within this fare environment.

The types of restrictions that might be used can vary, and are driven by the marketplace. There may be restrictions on when the trip must begin, when it must end, or the days of the week during which travel is permitted. There may be "black out" periods, or restrictions on the number of seats on a particular flight that are available at the reduced fares. Some reduced fares may be available on particular flights only if that flight has not been filled with higher fare passengers at or near the time of departure.[8]

The traveling public has benefited from the use of restricted discount fares. Today, over 90% of all travelers use some form of discount fare. Moreover, a DOT Task Force on the Airline Industry found that air fares *declined* 28% between 1978 and 1989 when measured in real (*i.e.*, inflation adjusted) dollars. Since deregulation the number of fares published through computerized networks has increased from about one million to over 50 million fares. By making air travel more affordable to more people, the airline industry

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[8] This latter practice is what the airline industry calls "yield management." Yield management techniques monitor how well a flight is "selling" during the days, weeks and months before it is scheduled to depart. At various times before departure, the booking patterns on the flight are studied, and an informed judgment is made as to whether the number of seats available in each fare category should be adjusted. If the flight is not selling well, more heavily discounted, but restricted, seats might be offered. If the flight is filling up, the remaining seats might be saved for last minute business travelers that are prepared to pay full fare for a premium product. Thus, at any given time, the number of seats available at any fare level on any particular flight may be different.

has been able to offer more choices and to keep fares down overall—just as Congress intended when it deregulated the industry.

Today, the competitive airline marketplace offers a host of different types of fares that reach out to all segments of the traveling public. Many of these fares are characterized by a series of restrictions that permit them to function efficiently within the overall scheme of airline pricing. Because of this complexity, which is driven by the economics of the industry, it has become increasingly more difficult to communicate in any single advertisement all of the details concerning a fare, while at the same time keeping the advertisement sufficiently short and direct to make it an effective competitive tool available at a reasonable cost and on a timely basis.

B. REGULATION OF AIRLINE FARE ADVERTISING BY THE STATES WOULD INCREASE THE COST OF IMPLEMENTING AND PROMOTING RESTRICTED DISCOUNT FARES, WOULD DELAY THEIR INTRODUCTION IN COMPETITIVE SITUATIONS, AND WOULD DISCOURAGE OR LIMIT THE USE OF SUCH LOWER FARES TO THE DETRIMENT OF THE TRAVELING PUBLIC AND THE AIRLINE INDUSTRY.

The regulation of airline fare advertising by the states would reduce airline advertising and ultimately cause a decline in the intensity of airline fare competition. A promotional fare is not effective unless it generates additional traffic, and it cannot generate traffic unless consumers learn about it through advertising. If such fares cannot be promoted efficiently, then they will become less attractive and their use as a competitive tool will decline.

1. The Lack Of Regulatory Uniformity Caused By State Regulation Of Fare Advertising Would Increase Advertising Costs Associated With Restricted Discount Fares, And Deter The Introduction And Use Of Such Fares

The states contend that they should be permitted to dictate the precise content and format used in advertising relating to discount fares. While acting together through the National Association of Attorneys General for the moment, each state asserts that it is free to apply its own disclosure requirements to airline advertising.[9] Regulation of airline fare advertising by multiple sovereigns would seriously undermine the ability of airlines to compete effectively as to price, and frustrate the intent of Congress under the Airline Deregulation Act.

American does business in all fifty states. It advertises in 184 newspapers published in 40 different states, including national publications such as the Wall Street Journal, USA Today and the New York Times. American broadcasts advertisements on television in

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[9] In fact, the NAAG Guidelines do not provide for uniformity in the application of state laws to airline fare advertising. The application of the Guidelines by the attorneys general themselves is "subject to individual prosecutorial discretion and variations in individual state and common law." Brief of Petitioner at p. 6. Moreover, many state deception laws give private causes of action to individuals, who would not be bound by the NAAG Guidelines in any way. These individuals could seek to have state court judges, who may know nothing of NAAG and who certainly are not bound by its Guidelines, impose even stricter standards upon airlines. Thus, even if the attorneys general remain uniform under the NAAG Guidelines (which is unlikely), the laws of the states as applied by state courts will almost certainly evolve along non-uniform lines based upon individual decisions in private cases.

fourteen cities in eleven states using fifty to sixty different stations. Moreover, American also broadcasts its ads on 916 radio stations in 135 cities in 40 states. Currently, American checks its fares and its fare advertising to guarantee that they are legal under uniform DOT guidelines. At times this entire process must be completed in a matter of hours in order to respond to a fare initiative offered by a competing airline. It takes between 48 and 72 hours lead time to prepare a print or radio ad, and between 72 and 96 hours to prepare a television spot.

If each of the fifty states gains the power to regulate fare advertising in accordance with its own statutes, regulations, court decisions, and common law, then airlines must add the following steps to the process of developing, implementing and promoting new fares:

(1) Any new fare must be evaluated in light of the laws of all fifty states to determine if it meets minimum disclosure requirements for offering in each state in light of its proposed restrictions.

(2) Any advertising copy for the new fare must be evaluated by lawyers familiar with the laws of each of the fifty states to assure compliance with the disclosure requirements of each state.

(3) Advertising copy would need to be individually prepared for each newspaper, radio station, and television station depending on where the advertisement is to be disseminated. In some areas media markets cross over state lines (*e.g.*, the areas around New York City, Washington, D.C., Kansas City, St. Louis, etc.). Other publications reach national audiences. In such cases, special efforts will be required to either

develop a customized advertisement or insert, or fall back to a "least common denominator" form of ad copy.

(4) Extra time and effort would be required to explain to travel agents, passengers and others that the fare described in one state is really the same as that set forth in advertising that is different in a neighboring state.[10]

Obviously, these extra steps and requirements will impose extra costs. Moreover, where there is the need to move quickly to respond to a fare initiative offered by a competitor, these additional burdens will either result in even greater costs, or will prevent a timely response altogether.

The alternative to incurring these extra costs and delays is to offer fewer discount fares, with fewer restrictions, and to promote them less—a very real possibility given the chilling effect caused by uncertainty regarding how the courts of 50 different states might enforce their consumer protection laws. Instead, airlines would emphasize less restricted (and more expensive) fares that can be introduced quickly and promoted easily in generic advertisements.

Whichever alternative is selected, the result is less information and fewer options for consumers at

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[10] A problem exists even in the unlikely event that all of the states impose the same advertising rules, because the states are not guided by the Congressional mandate to balance competitive concerns with disclosure requirements. *See* Argument, Part I.C, *supra*. Increasing the amount of information that must be contained in any advertisement of a restricted fare, even if done on a uniform basis, will increase the cost of such advertising and reduce the amount of such advertising--thereby reducing the amount of price competition in the marketplace.

greater cost. As restricted discount fares become more costly and time consuming to implement when compared with non-restricted, less-discounted fares, fewer of the restricted fares will be introduced. Remaining fares will need to be increased, to the extent permitted by competition, to cover the increased costs imposed by regulation. If fares cannot be increased due to competition or other market forces, the increased costs will contribute to the further deterioration of the financial performance of the U.S. airline industry.

2. The Type Of Regulation Currently Proposed By The States Would Effectively Eliminate Many Existing Discount Fares

It would be extremely difficult, and in many cases impossible, to advertise reduced fares if the advertisement itself had to disclose every restriction on that fare. As the United States has noted:

> The convergence of increasing price competition and increasing fare complexity raises difficult issues from the standpoint of regulating price advertising . . . As price advertising becomes an increasingly important element in the marketplace for air travel, it becomes increasingly difficult to convey in any advertisement the full complexity of the fare structure and ticket restrictions, while keeping the advertisement sufficiently short and clear so that it can serve as an affordable and effective price competition tool.

Brief for the United States as *Amicus Curiae*, at p. 10. The Association of National Advertisers commented during DOT rulemaking proceedings that the NAAG Guidelines "effectively bars all 15-second advertisements for air fares and creates significant clutter problems in a 30-second spot." DOT Docket 46410, Comments of the Association of National Advertisers, Inc., at pp. 4-5.

Obviously, if more information about restrictions must be included in an advertisement, either the advertisement must grow larger (if a print ad) or longer (if a radio or television ad), or some existing information must be deleted. Either way, the cost of advertising is increased. Because restricted fares would require the greatest amount of ad space or ad time to promote, they would be the most expensive fares to promote. As the most expensive fares to promote (as well as the fares that generate the least revenue per passenger), they would be promoted the least, or would be abandoned altogether for fares that can be promoted more efficiently. Indeed, restricted discount fares, by their very nature, rely more heavily upon effective promotion to the public than standard, full fares that are generally paid by non-discretionary travelers. The result would be the elimination of certain discounted fares as a result of state regulation of what must be said about those fares to the public.

C. THERE IS NO NEED FOR STATE REGULATION OF AIRLINE FARE ADVERTISING IN LIGHT OF THE ONGOING CONTROL EXERTED BY THE DEPARTMENT OF TRANSPORTATION

In many ways the airline industry is unique in the amount of free information and assistance provided to consumers prior to purchase. There is obviously extensive advertising by all sellers. But beyond that, the industry provides a consumer with a travel agent or a trained sales agent who acts at no cost to the consumer as an advisor and consultant prior to pur-

chase.[11] The agent represents all sellers in the market, and has the authority to offer every product available. Moreover, in most cases the agent has instantaneous access through a computerized reservation system to information about every option and every price offered in the marketplace. No other industry offers such an abundance of competitive information—all of which is available free prior to purchase.

Furthermore, Congress has empowered the DOT to intervene against "unfair or deceptive practices" pursuant to 49 U.S.C. App. §1381, and the DOT has vigorously exercised that power. In 1991 the DOT fined scheduled airlines several times for allegedly deceptive consumer practices—imposing the highest total in fines since the DOT began tracking such things five years ago. The DOT has also been pursuing other regulatory techniques, including rulemaking, to provide uniform guidance and control in this area. *See* 54 Fed. Reg. 31,052 (1989)(notice of proposed rulemaking re advertising of airline fares).[12]

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[11] Over 80% of all air travel is ticketed through travel agents. More than 90% of all travel agents in the United States are automated with some computerized reservation system. American's computerized reservation system, SABRE, is the largest of these systems. Agents using SABRE have access to information about the flights of essentially every airline in the world, all available fares, and can even ask the computer to automatically search for and locate the lowest available fare for any itinerary. SABRE competes in the United States with three other computerized reservation systems that provide similar services to travel agents and consumers.

[12] Petitioner accuses the DOT of either failing to enforce federal consumer protection laws, or of going so far as to "circumvent" them. Brief of Petitioner at pp. 26-27. The record of enforcement actions initiated and successfully concluded by the

With the availability of free pre-purchase information from travel agents and other sources, and the active regulation by the DOT, there is simply no need for the states to impose all of the burdens of additional regulation under the laws of each of 50 different states.[13]

III. IF THE COURT DECIDES THAT THE REGULATION OF AIRLINE FARE ADVERTISING IS NOT PREEMPTED, IT SHOULD MAKE CLEAR IT IS NOT ADDRESSING STATE LAWS THAT PURPORT TO DICTATE AIRLINE RATES AND SERVICES

American is currently involved in a case pending before the Illinois Supreme Court captioned *Wolens, et al. v. American Airlines, Inc.* (Case No. 71418, Ill. S. Ct.). In that case, the plaintiffs are attempting to

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DOT refutes the first charge. The second charge reflects a difference of opinion between the DOT and Petitioner regarding how much government regulation of the free market is optimum. The DOT's conservative and informed intervention in the competitive process is more consistent with the role Congress mandated in the Airline Deregulation Act than the micro-management approach suggested by Petitioner. *Amici* Public Citizen, *et al.*, imply that the DOT has not monitored airline advertising by discussing only the rulemaking efforts that are in process. Brief of *Amici* at pp. 5-6. *Amici* ignore the case-by-case enforcement that has occurred.

[13] The Court has been made aware of the pendency of rulemaking proceedings relating to airline fare advertising before the DOT. *See* Brief of *Amici* at pp. 5-6. Once the DOT acts, it will have expressly pre-empted any state regulation of airline fare advertising pursuant to its final rule, making the application of the "relating to" language to fare advertising a moot issue. One option available to the Court in this case that provides a basis for decision that is even more narrow than that suggested by American is to deny certiorari in this case as improvidently granted, and permit the DOT to occupy this area by regulation.

use state common law and the state deceptive practices act to dictate the number of seats that American makes available for members of its frequent flyer program on specific flights, and to preclude the use of "blackout" dates on which tickets cannot be purchased with frequent flyer credits. That case presents an even narrower question than the one presented to this Court because it involves the use of state law to dictate not only what airlines say, but what they do. Even if the Court were to rule (incorrectly, in American's view) that Section 105 does not pre-empt state efforts to regulate airline fare advertising, it would still certainly be the case that the claims at issue in the *Wolens* case would be pre-empted. At the very least, the Court should expressly leave this question open.

CONCLUSION

Notwithstanding our nation's deep commitment to the concepts of federalism and retained state sovereignty, this is a case where Congress has exercised its authority under the Constitution to establish federal regulation as the supreme, and the exclusive, law of the land. Congress has done so for good reason, and the results have benefited consumers with lower fares and the best air transportation system in the world. Any interpretation of the Airline Deregulation Act that would permit concurrent state authority over the advertising of airline fares would do serious damage to a fundamental concept of our federal system: The deference of the judicial branch to the legislative branch in the enactment of new laws. Moreover, increased state regulation of the airlines would be contrary to our nation's strong commitment to free

market principles and competition. *See Northern Pacific Railway Co. v. United States*, 356 U.S. 1, 4 (1958) (competition creates an economic environment "conducive to the preservation of our democratic political and social institutions").

Thus, the Fifth Circuit's decision below should be affirmed, and the current system of balanced, exclusive federal regulation over airline fare advertising should be preserved.

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February 12, 1992

Supreme Court, U.S.
FILED
JAN 13 1992
OFFICE OF THE CLERK

No. 90-1604

In The

Supreme Court of the United States

October Term, 1991

DAN MORALES, ATTORNEY GENERAL OF TEXAS,

Petitioner,

vs.

TRANS WORLD AIRLINES, INC., et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF AMICI CURIAE OF THE STATES OF HAWAII, ALABAMA, INDIANA, LOUISIANA, MISSISSIPPI, NEW JERSEY, NEW MEXICO, PENNSYLVANIA, UTAH AND VIRGINIA IN SUPPORT OF PETITIONER

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The amici States enumerated above, by their respective Attorneys General, submit this brief in support of reversal of the judgment of the United States Court of Appeals for the Fifth Circuit entered in the proceeding below on January 18, 1991.

INTEREST OF AMICI CURIAE

The amici States have a significant interest in seeing that they have the right to enforce their own state false and deceptive advertising laws against airlines that engage in unfair and deceptive airline advertising practices in order to protect their citizens from the obvious harm such advertising brings. If the decision of the Fifth Circuit is allowed to stand, the amici States, indeed all States, may be barred from protecting their citizens from deceptive airline advertising. Such an evisceration of the States' historic police powers to engage in consumer protection cannot be upheld absent a clear and manifest mandate of Congress to that effect, a mandate that was clearly lacking in this case.

ARGUMENT

I. The Fifth Circuit's Holding that State False and Deceptive Advertising Laws are Preempted is Plainly Wrong as a Matter of Law and Conflicts with Decisions of this Court and Other Courts.

In *Nader v. Allegheny Airlines*, 426 U.S. 290 (1976), this Court held that § 411(a) of the Federal Aviation Act, 49 U.S.C. § 1381(a), authorizing the Civil Aeronautics Board (CAB) to issue cease and desist orders against unfair or deceptive practices or unfair methods of competition, did not impliedly preempt state common-law tort actions for fraudulent misrepresentation by an air carrier. In allowing state law causes of action to proceed, this Court stated that "§ 411(a) confers upon the Board a new and

powerful weapon against unfair and deceptive practices that injure the public. But it does *not* represent *the only*, or best, response to all challenged carrier actions that result in private wrongs." 426 U.S. at 303 (emphasis added). By analogy therefore, § 411(a) does not preempt State false and deceptive advertising laws. Even if a particular airline advertising practice does not constitute an unfair or deceptive practice under § 411(a), the states would still be allowed to enforce their own false and deceptive advertising laws against the practice. *Cf. Nader*, 426 U.S. at 301-02 ("No power to immunize can be derived from the language of § 411. . . . Section 411 is both broader and narrower than the remedies available at common law.").

Although the federal preemption provision, § 105(a)(1) of the Federal Aviation Act, 49 U.S.C. § 1305(a)(1), was not enacted at the time of *Nader* (being added in the Airline Deregulation Act of 1978), § 411(a) has remained essentially unchanged, except for the fact that the Department of Transportation, and not the Civil Aeronautics Board, is now the federal governmental body responsible for monitoring unfair and deceptive practices in the airline industry. Therefore, *Nader's* holding of no implied § 411 preemption of state laws concerning unfair and deceptive practices is still the law today.

Because any implied preemption argument was foreclosed by *Nader*, the Fifth Circuit instead based its decision on an erroneous interpretation of the § 105(a)(1) preemption provision added by the Airline Deregulation Act, which states:

> [No] state . . . shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to *rates, routes or services* of any air carrier having authority under subchapter IV of this chapter to provide air transportation.

§ 105(a)(1) (emphasis added). Because the states in the exercise of their police powers have historically and traditionally been the primary regulators in the area of consumer protection, preemption of such matters will not be found unless that is the "clear and manifest purpose" of Congress. *See Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Not only can no clear and manifest purpose of Congress to preempt state regulation of false and deceptive advertising practices be discerned in either the plain language of § 105(a)(1) or its legislative history, but in fact the plain language and history actually suggest the exact opposite.

Section 105(a)(1), by its plain language, only preempts laws directly relating to *rates, routes* or *services*, and not laws controlling the *advertising* of rates, routes or services. *See People v. Western Airlines*, 155 Cal.App.3d 597, 600, 202 Cal.Rptr. 237, 238 (1984) *cert. denied*, 469 U.S. 1132 (1985); *Kansas v. Trans World Airlines*, 730 F.Supp. 366, 368 (D.Kan. 1990). Had Congress intended to preempt State false and deceptive advertising laws, it could have easily done so by simply adding the phrase, "or the advertising thereof." The States' false and deceptive advertising laws are not intended to, and do not in fact, determine anything at all with regard to what airlines charge, what routes they take, or what services they provide. State false and deceptive advertising laws

merely ensure that whatever the rates, routes and services the airlines choose to have, which amici States concede they may not regulate, that they are not deceptively advertised in the free market. *See New York v. Trans World Airlines*, 728 F.Supp. 162, 176 (S.D.N.Y. 1989). The Fifth Circuit's attempt to construe "relating to rates, routes, or services" to encompass advertising is thus unwarranted.

The Fifth Circuit's heavy reliance on *Shaw v. Delta Air Lines*, 463 U.S. 85 (1983), is misplaced. In *Shaw*, this Court held that a New York Human Rights Law forbidding discrimination in employee benefit plans on the basis of pregnancy was preempted by a federal ERISA provision superseding all State laws "relat[ing] to any employee benefit plan." It was obvious in that case that the anti-discrimination provision would *directly* affect the *substantive* content of employee benefit plans and thus clearly "related to" employee benefit plans. Employers subject to the law would be substantively constrained in setting up their benefit plans. Here, however, the regulation of the advertising of rates does *not* directly affect the substantive rates themselves. The airlines are free to charge whatever they wish, regardless of any state deceptive advertising restrictions. Thus, *Shaw* is wholly inapposite.

To the extent State penalties or injunctions on deceptive airline advertising or the adoption of practices by an airline to avoid such state enforcement actions indirectly affect rates, such an impact on rates would be merely *incidental*. As this Court stated in the exactly analogous situation in *Nader*, "any impact on rates that may result from the imposition of tort liability or from practices adopted by a carrier to avoid such liability would be

merely incidental." 426 U.S. at 300; *see also Western Airlines*, 155 Cal.App.3d at 600, 202 Cal.Rptr at 239.

The Ninth Circuit has properly rejected the sort of overly expansionist reading of § 105(a)(1)'s "relating to" language at the root of the Fifth Circuit's decision. *See, e.g., West v. Northwest Airlines*, 923 F.2d 657, 660 (9th Cir. 1990); *Air Transport Ass'n of America v. Public Utilities Comm'n*, 833 F.2d 200, 207 (9th Cir. 1987), *cert. denied*, 487 U.S. 1236 (1988).

The legislative history also unambiguously supports the position that § 105(a)(1) was only intended to preclude state laws that directly impact rates, routes or services, and not laws regarding the deceptive advertising of those matters. There is no reference in the legislative history to § 105(a)(1) that even mentions airline advertising. The section was enacted with the intent of providing for exclusive federal control of airline rates, routes and services, with such federal control to be limited in the context of deregulation. It would, of course, have been inconsistent with deregulation to allow the states to simply fill the void left by federal deregulation. Hence, § 105(a)(1) was needed to prevent any attempts by the states to regulate airline rates, routes or services. But state regulation of airline *advertising*, so long as the state does not attempt to affect or determine the rates, routes, or services themselves, does not in any way interfere with Congress' goal of deregulation of airline rates, routes, and services.

In enforcing their deceptive advertising laws against the airlines, the States have no interest in what the airlines charge, but only seek to ensure that the airlines represent their charges fairly and nondeceptively. The Fifth Circuit's only other argument to support its

overbroad construction of § 105(a)(1), outside of the flawed *Shaw* analogy, is essentially an implied § *411* preemption argument. It notes, for example, that the CAB's § 411 powers were not terminated under the Airline Deregulation Act, but rather were eventually transferred by operation of law to DOT, and somehow concludes that Congress thereby intended to protect consumers by providing a uniform system of federal regulation of unfair or deceptive practices by airlines. *See Trans World Airlines v. Mattox*, 897 F.2d 773, 782-83 (5th Cir. 1990). This, of course, is the very same implied preemption argument flatly rejected by this Court in *Nader*. *See supra* pp. 2-3. The only uniformity that Congress intended was in connection with rates, routes and services, *see* H.R. Rep. No. 1211, 95th Cong., 2d Sess., *reprinted in* 1978 U.S. Code Cong. & Admin. News 3737, 3751-52, but with regard to deceptive *advertising*, Congress allowed both a federal and state presence. *Cf. Nader* (allowing state common law misrepresentation claim to coexist with § 411).

In sum, not only was this Court's stringent preemption standard of a "clear and manifest purpose" of Congress not satisfied with regard to preemption of state deceptive advertising laws, but if there was any clear Congressional intent at all regarding airline advertising, it was that the states should be free to enforce their deceptive advertising laws.

Besides the clear import of this Court's own decisions demonstrating that preemption here is not warranted, other courts have properly and explicitly rejected § 105(a)(1) preemption of state deceptive advertising laws, in direct contradiction to the Fifth Circuit's decision. *See, e.g., People v. Western Airlines*, 155 Cal.App.3d

597, 202 Cal.Rptr. 237 (1984); *Kansas v. Trans World Airlines*, 730 F.Supp. 366, 368 (D.Kan. 1990); *New York v. Trans World Airlines*, 728 F.Supp. 162, 176 (S.D.N.Y. 1989).[1]

In short, the Fifth Circuit's decision deprives all the States of the ability to protect their citizens from the direct injury caused to consumers from deceptive advertising and the broader economic damage to the efficiency of a marketplace forced to operate with deceived market participants. Because Congress clearly did not intend § 105(a)(1) to have that effect, its goal being solely deregulation of rates, routes, and services, and not deregulation of *deceptive advertising* of the former, the Fifth Circuit plainly erred.

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[1] *See also Alaska v. U.S. Dep't of Transportation*, 868 F.2d 441 (D.C. Cir. 1989) (*implicitly* rejecting § 105(a)(1) preemption). The State of Alaska was held to have standing to challenge various DOT airline advertising rules (on the ground that the rules were not adopted pursuant to proper notice-and comment procedures) because the rules would conflict preempt state deceptive advertising laws. If § 105(a)(1) expressly or impliedly preempted *all* state deceptive advertising laws, then Alaska would not have had standing to challenge the specific DOT rules, because Alaska's injury, the inability to enforce its deceptive advertising laws, would not be redressed by a striking down of the DOT rules. In other words, the Court's holding was premised on the assumption that only *conflict* preemption was at issue, and that there was no express or implied preemption of *all* state advertising laws under § 105(a)(1). 868 F.2d at 444 ("The 1988 [DOT] Orders . . . provide the only possible basis for preemption of state regulation . . . .)

CONCLUSION

For the foregoing reasons, the amici States respectfully request the decision of the United States Court of Appeals for the Fifth Circuit be reversed.

Dated: Honolulu, Hawaii, January 13, 1992.

Respectfully submitted,

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